Nos. 18505 and 18776

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 18505

UNITED STATES OF AMERICA,

Appellant,

vs

MONOLITH PORTLAND MIDWEST COMPANY,

Appellee,

No. 18776

MONOLITH PORTLAND CEMENT COMPANY,

Appellant,

vs.

R. A. RIDDELL, District Director of Internal Revenue, Los Angeles District,

Appellee.

MONOLITH'S CONSOLIDATED OPENING BRIEF.

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MONOLITH'S CONSOLIDATED OPENING BRIEF.

Statement Showing Jurisdiction and Summarizing Prior Proceedings.

These two appeals have been consolidated for briefing and presentation to the Court.

Each appeal involves the correct percentage depletion allowance under Section 114(b)(4) of the Internal Revenue Code of 1939, as amended, applicable to each tax-

payer's* extraction and processing of its particular calcium carbonate materials into cement.

The *Monolith* appeal (No. 18776)** is an appeal by the taxpayer from a judgment of the District Court made and entered May 10, 1963 [R. 828],*** dismissing its complaint for refund of taxes paid for the year 1952, following the January 14, 1963, Opinion of the Supreme Court (reversing this Court's judgment [R. 748], which had affirmed the District Court's original judgment for the taxpayer [. 168]); and remand to the District Court for proceedings "in accordance with" the Opinion [R. 776] and mandate [R. 773], of the Supreme Court. The District Court did not issue an

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*Monolith Portland Cement Company (hereafter sometimes called "Monolith" or taxpayer) owns all of the common stock of Monolith Portland Midwest Company (hereafter sometimes called "Midwest" or taxpayer), and at all relevant times, Midwest was in privity with Monolith with regard to the depletion controversy with the United States and its agents, and the litigation resulting therefrom. [*Midwest,* Clk. Tr. p. 1294.]

**This is the third appeal involving the dispute between Monolith and the United States over the correct depletion deduction allowable to a cement producer for the depletion of its mineral deposit processed into cement. *Monolith Portland Cement Company v. United States,* 269 F. 2d 629, 9 Cir. 1959, involving the tax year 1951, is referred to herein as the "first Monolith case." *Riddell v. Monolith Portland Cement Company,* 301 F. 2d 488, 9 Cir. 1962, rev'd, 371 U. S. 537, involving the tax year 1952 is referred to herein as the "second Monolith case."

***In the interests of conformity and continuity, appellant Monolith has had all the proceedings subsequent to the prior appeal herein (including this Court's opinion) printed as part of the record on appeal. Both the record on the prior appeal (No. 16914) and the subsequent proceedings have been bound together in chronological order under the new docket number of this third *Monolith* appeal (No. 18776), and will be cited herein as "[R. .....]." Pages 1-739 are former Volumes I and II of the printed record in appeal No. 16914; pages 740-855 comprise the record of the proceedings thereafter. Citations to the "first *Monolith* case" will appear as "[*Monolith,* No. 16063, R. .....]."

opinion, either originally or following the remand. This Court's prior opinion [R. 749] appears at 301 F. 2d 488. The Opinion of the Supreme Court [R. 774], appears at 371 U. S. 537, 9 L.ed.2d 492, 83 S. Ct. 378.

The *Midwest* appeal (No. 18505), is an appeal by the United States from a judgment of the District Court made and entered September 25, 1962 [*Midwest,* Clk. Tr. p. 1306*], in favor of the taxpayer on its complaint for refund of taxes paid for the years 1951 and 1952.

This Court has jurisdiction to review the judgments entered by the District Court in each case by virtue of Section 1291 of Title 28, United States Code.

The Statute.

The relevant statute, Section 114(b)(4) of the Internal Revenue Code of 1939, as amended, establishing the rate of percentage depletion for the taxpayers' minerals and the depletion base to which the rate is applied, is set out in full in the Appendix, at pages 1-4. In particular, the following portions of such statute are here involved:

Section 114(b)(4)(A) provides:

> "The allowance for depletion in the case of the following mines and other natural deposits shall be—
>
> (i) in the case of . . . stone [and] . . . marble . . . 5 per centum,

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*The United States, appellant in No. 18505, has not printed the record, but instead, has had the Clerk's Transcript reproduced. Citations to such record will be made herein as "[*Midwest,* Clk. Tr. p. ....]," "[*Midwest,* Rep. Tr. p. ....]," etc.

(ii) in the case of . . . dolomite . . . [and] calcium carbonates . . . 10 per centum,

(iii) In the case of . . . chemical grade limestone . . . 15 per centum, . . .

(iv) . . . of the gross income from the property . . . such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property . . ."

Section 114(b)(4)(B) provides:

"As used in this paragraph the term 'gross income from the property' means gross income from mining. The term 'mining' as used herein shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products . . . The term 'ordinary treatment processes', as used herein, shall include the following: (i) . . .; (ii) . . .; (iii) in the case of . . . and minerals which are customarily sold in the form of a crude mineral product—sorting, concentrating, and sintering to bring to shipping grade and form, and loading for shipment . . ."

Summary Statement of the Case.

Each of these appeals presents essentially the same threshold issue—what was the correct depletion base and rate of depletion to be used by cement taxpayers

for the calcium carbonates materials they used to make cement in computing their 1952* income taxes?

The Government contends that the 1963 decision of the Supreme Court in *Monolith* conclusively answered this question in the Government's favor, and that such decision concluded not only the question of statutory interpretation there expressly presented and decided, but also all other questions neither presented, discussed nor decided; and that, on the authority of *Monolith,* the District Court's judgment for taxpayer in the *Midwest* appeal must therefore be reversed and the judgment of dismissal in the *Monolith* appeal must be affirmed.

The taxpayers submit that while the decision of the Supreme Court in *Monolith* is conclusive as to the single question of law there presented and decided—the correct interpretation of Section 114(b)(4)(B) of the Internal Revenue Code of 1939, as amended—the remaining questions left at large by the Supreme Court's summary reversal of *Monolith* on the certiorari papers alone, particularly the settled rule against retroactive application of a new judicial decision announcing a new interpretation of an old statute—are dispositive of these two appeals even in the light of *Monolith,* and that the correct answers to such remaining questions require an affirmance in *Midwest,* and a reversal in *Monolith.*

Thus, the first and threshold question presented here is the correct construction of the Supreme Court's decision in *Monolith* extending the *Cannelton* rule to cement producers—its meaning, its scope and its application to Monolith and to other similarly circumstanced cement producers, such as Midwest.

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*The *Midwest* case also involves its 1951 tax year.

Statement of Facts.

A. Introduction.

As heretofore noted, these cases concern the correct depletion deduction for the special type of limestone used by cement producers to make cement.

Monolith Portland Cement Company ("Monolith") is a Nevada corporation with its principal office in Los Angeles, California [R. 170], which operates a quarry and cement plant at Monolith, California [R. 171]. Monolith Portland Midwest Company ("Midwest") is also a Nevada corporation with its principal office at Los Angeles, California [*Midwest* Clk. Tr. p. 1294], which operates two quarries and a cement plant at Laramie, Wyoming, [*Midwest* Clk. Tr. p. 1295].

All of Midwest's common stock is and was owned by Monolith, and at all relevant times, Midwest is and was in privity with Monolith, with regard to the depletion controversy with the United States and its agents, and the litigation resulting therefrom. [*Midwest* Clk. Tr. p. 1294].

B. Facts Relating to the Depletable Mineral, Processes and Market.

The significant facts as to the mineral involved, the processes used, and the market are undisputed. "Limestone" is a general geologic term used to describe the entire range or series of rocks which consist principally (more than 50%) of calcium carbonates [R. 141, 509; *Midwest,* Clk. Tr. p. 1295; Ex. 17, 34]. However, the term "limestone" has no commercial significance because of its generality. As the Government admitted, "We know of no 'limestone industry' nor any

designation by it for rocks of the type mined by plaintiff." [R. 96]. There are many different, commercially recognized classes or types of "limestone", which correspond with the statutory classes of "limestone" Congress expressly separately enumerated in Section 114(b)(4)(B). (*e.g.* "stone", "oyster shell", "clam shell", "marble", "dolomite", "calcium carbonate", "chemical grade limestone", "metallurgical grade limestone"). Generally speaking, the rate provided by Congress for each of the commercially identifiable classes of "limestone" is proportionate to the supply and commercial importance of the class. Thus, limestone suitable only for gross physical purposes as "stone" is given a 5% rate (Section 114(b)(4)(A)(i)), while limestone high enough in calcium carbonates to be used for its chemical content is classified as "calcium carbonates" at 10% (Section 114(b)(4)(A)(ii)), and the rarer limestone which approaches pure calcium carbonates is known and classified as "chemical grade limestone" and "metallurgical grade limestone" at 15% (Section 114-(b)(4)(A)(iii)). Obviously, all "limestones" are not the same mineral and are not interchangeable in commercial application. For example, "dolomite" limestone, a composite calcium-magnesium limestone, is not usable in any application where magnesium is deleterious. [Ex. 34].

The uses of "limestone" may be divided into three general categories: (a) in the chemical and chemical process industries for its chemical properties; (b) as an agricultural soil conditioner; (c) for physical uses where its chemical properties are unimportant. [*Midwest,* Clk. Tr. pp. 1296-1297]. Unlike some minerals and mineral products, there is no national market for

"limestone." Instead, limestone is customarily produced for local markets. [*Midwest,* Clk Tr. p. 1297]. Thus, national statistics of "limestone sold or used" published by the Bureau of Mines do not identify or distinguish between the many different statutory kinds and types and the quantities of each [*Midwest,* Clk. Tr. p. 1297].

Monolith's mineral in the tax year 1952 (as in the first *Monolith* case) was a hard, recrystallized limestone, averaging 86% calcium carbonate [R. 147].* The actual market for such type of limestone was negligible unless it was processed into cement [Monolith, No. 16063, R. 65]. As the government has admitted, because of the abundance of other, more suitable materials, limestone is rarely used as stone for gross physical purposes as riprap, ballast, concrete aggregate and road metal in the Western United States [R. 292]. In addition, since most chemical users of limestone specify 95% calcium carbonate content or better, Monolith's type of limestone (averaging 86% calcium carbonate) could not be used for any purpose for which chemical properties are important except cement [R. 275-277, 341-345].

Midwest's mineral in the tax years 1951 to 1952 came from two quarries—the Forelle (averaging 90% calcium carbonate), and the Niobrara (a soft argillaceous limestone commonly called cement rock, averaging 68% calcium carbonate)—which were mixed to obtain the most suitable cement composition [*Midwest,* Clk. Tr. pp. 1295-1296]. Midwest's limestone was too high in silica and not high enough in calcium carbonate content for any chemical or chemical process use except cement and

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*The mineral called "calcium carbonate rock" in the *Dragon* case was also "crystallized limestone."

was neither suitable nor fit for use in such non-cement industrial chemical processes. *A fortiori* it was not marketable for such uses. [*Midwest,* Clk. Tr. p. 1297]. Despite a theoretical suitability of some of such material for some physical, non-cement uses, Midwest's type of limestone was not salable or marketable for any such physical non-cement use, regardless of profitability; there was no market for Midwest's type of limestone in the years 1951 and 1952 prior to the time such limestone became finished cement; and Midwest did not by-pass a market. [*Midwest,* Clk. Tr. pp. 1297-1298].

Both Monolith and Midwest employed the customary "wet process" to produce Portland cement from their particular type of limestone during the tax years in question. [R. 171-173; *Midwest,* Clk. Tr. p. 1298]. Briefly, such processes and process steps (which were the ordinary treatment processes normally applied by mine owners and operators having similar deposits [*Midwest,* Clk. Tr. p. 1298]), comprised the quarrying, crushing and ballmilling of the limestone, blending the milled limestone with small amounts of additives and water; grinding such mixture into a fineness known as "slurry"; and, by calcining or "sintering" the slurry to incipient fusion in a rotary kiln so as to drive off the water and impurities, concentrating the residue into a dense "clinker", which, when finely ground and with a little gypsum added, is finished cement. [R. 6-9, 173; *Midwest,* Clk. Tr. pp. 1298-1299].

Originally, and in compliance with this Court's decision in the first *Monolith* case, the District Court had found that Monolith's depletable mineral was either "calcium carbonates" at 10% or "chemical grade limestone"

at 15% [R. 172]. This finding was affirmed in the second *Monolith* case [301 F.2d 488, 497]. Apparently relying upon the Government's representation that the courts below had correctly classified Monolith's type of limestone as either "calcium carbonates" or "chemical grade limestone" under the statute and that such issue was hence no longer in dispute [Petition for Certiorari pp. 3, 7, FN 6], the Supreme Court did not consider the question of the proper statutory classification. However, on the remand, the District Court referred to Monolith's depletable mineral as "limestone" and "in conformity with the Supreme Court's mandate", set Monolith's depletion base at "crushed limestone." Neither "limestone" nor "crushed limestone" are specified as depletable minerals in Section 114(b)(4)(A).

The District Court classified Midwest's depletable minerals as "calcium carbonates" subject to a 10% depletion rate under Section 114(b)(4)(A)(ii), based on its high calcium carbonate content [*Midwest,* Clk. Tr. pp. 1295]. The Government has not challenged such classification on this appeal.

C. Facts Relating to the Tax Returns, Their Audit and Payment, and the Basis for These Actions.

Monolith timely filed a corporation income tax return for the year 1952 on which it claimed a depletion deduction computed upon a "slurry" depletion base* at the rate of 10% for "calcium carbonates" [R. 127], in accordance with the then-current Treasury Regula-

*The "slurry" in a "wet" cement process plant like Monolith's and Midwest's is the pre-kiln state in processing just before the crushed, ground and blended raw materials (in semi-liquid form) are fed into the kiln [R. 8; *Midwest,* Clk. Tr. p. 1298].

tions and the Government's interpretation* of the statute and such Regulations, in the same form and by the same method as its prior, 1951 return [R. 337]. Upon audit, the Treasury confirmed Monolith's use of such "slurry" depletion base and the 10% "calcium carbonates" rate, but made certain other minor adjustments. Monolith paid the additional tax occasioned by such adjustments. [R. 176].

Midwest timely filed an income tax return for the years 1951 and 1952 in which it, too, claimed a "slurry" depletion base at the 10% "calcium carbonates" rate [Clk. Tr. pp. 505, 527].

On February 24, 1956, Monolith filed a claim for refund of $99,070.81 based upon a finished cement depletion base (instead of a "slurry" base), premised upon the *Cherokee* case [R. 20, 41, 176], which was disallowed [R. 176]. Later, Monolith filed two more claims for refund, which included a claim for taxes paid in 1952 in the amount of $186,753.30, on the theory that its

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*In 1953, the Treasury published Revenue Ruling 290, 1953-2 C.B. 41, which provided in part as follows:

> "'It is the position of the Internal Revenue Service that calcium carbonates and shale, mined for use in the cement industry, are not customarily sold in the form of the crude mineral product, and that, therefore, under section 39.23-(m)(1)(f) of Regulations 118, crushing and grinding are considered "ordinary treatment processes" in the computation of gross income from the property for percentage depletion purposes. Blending with other material after crushing and grinding, such as that occurring at the kiln feed bins, is excluded from "ordinary treatment processes", but where mixing of the calcium carbonates and shale occurs before or during crushing and grinding, it will be considered as incidental to such processes.'"

Revenue Ruling 290 is printed in full in the Appendix, p. 4.

depletion base was finished cement [R, 143], premised upon *Dragon Cement Company v. United States,* 244 F.2d 513, 1 Cir., 1957, *cer. den.* 355 U.S. 833 (1957).

On March 9, 1955 and February 24, 1956, Midwest also filed its claims for refund based upon a finished cement depletion base (instead of a "slurry" base).

Both of these cases originated in complaints filed by the taxpayers in the United States District Court, seeking a refund of the difference between the taxes they had paid (as fixed by the Internal Revenue Service) on a slurry or kiln-feed basis and the taxes due upon a finished cement basis, which taxpayers claimed applied to their situation. No issue has ever been presented in the *Monolith* case of whether the taxpayer's correct depletion base should be at some pre-slurry stage (*e.g.,* "crushed limestone"); however, the Government did assert an additional deficiency in the *Midwest* case premised upon such a "crushed limestone" depletion base.

D. Additional Facts Relevant to These Two Appeals.

As pointed out in Monolith's brief on the prior appeal (pp. 13-28),* although percentage depletion had been a part of the Revenue Code ever since 1926, it was not until 1951** that Congress extended percentage depletion to the non-metallic industrial minerals, including "stone", "calcium carbonates" and "chemical grade limestone." Therefore, depletion litigation involving industrial non-metallic minerals first began to come before the courts in 1953-1954.

**R. A. Riddell v. Monolith Portland Cement Company,* No. 16063.

***Act of October 20, 1951, C. 521, 65 Stat. 452, 497, Sec. 319.

The ten years, 1953-1963, involved in this case, fall logically into two distinct five year periods:

1. The period 1953-58, during which the Government was defeated in all its efforts—administrative, legislative and judicial—to minimize the explicit "commercially marketable product" rule of Section 114(b)(4)(B).

2. The period 1958-1963, during which the Government persuaded Congress to eliminate the "commercially marketable" rule for post-1960 tax years; and finally persuaded the Supreme Court to grant certiorari, and for the first time in any appellate court, to interpret "mining" as excluding the cement processes required to obtain a commercially marketable product, by reference to unsifted general statistics of *all* limestone—instead of by reference to the particular high-calcium limestone classified by Congress as "calcium carbonates."

In order to achieve the perspective needed to evaluate and decide the questions presented by the two appeals now before this Court, it is necessary to review the events which occurred in the period 1953-1963.

In the 5 year interim between the filing of Monolith's 1952 return in 1953 and its later claims for refund, the disallowance of which led to the commencement of these actions in 1958, the following significant events occurred:

1. Commencing with the case of *Cherokee Brick & Tile Co. v. United States,* 122 F. Supp. 59 (M.D. Ga. 1954), aff'd 218 F.2d 424, 5 Cir., 1955, a large number of depletion cases came before the

federal courts. Such courts (with the exception of one District Court decision—*Dragon*—which was later reversed) unanimously construed Section 114(b)(4)(B) as allowing as part of the depletion base all processing necessary to obtain a product which could actually be sold.*

2. In 1953, the Treasury officially conceded that "calcium carbonates . . . mined for use in the cement industry, are not customarily sold in the form of a crude mineral product," and asserted that the kiln feed (not crushed limestone) was the correct cut-off and depletion base for cement producers under Regulations 111 (Revenue Ruling 290, 1953-2 C. B. 41). The courts which passed upon the application of Section 114(b)(4)(B) to cement taxpayers held that the proper depletion base for such taxpayers was finished cement, rather than kiln-feed, as the Goverment contended.**

3. In 1957 the Government made a massive attack upon such adverse, unanimous state of the decisional law by applying for certiorari in 14 cases

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*A list of pre-May 15, 1958 (complaint) depletion cases is printed in the Appendix, p. 5.

***Dragon Cement Company v. United States,* 244 F. 2d 513, 1 Cir., 1957, cer. den., 355 U.S. 833 (1957); *Monolith Portland Cement Co. v. United States,* 168 F. Supp. 692 (S.D. Cal. 1958), aff'd. 269 F. 2d 629, 9 Cir. 1959. As Judge Magruder pointed out in *Dragon* in holding that Treasury Reg. 111, §29.23(m)-1(f) were invalid: (244 F. 2d 513, 518)

> "The dispute here involves the propriety of including income allocable to the kiln and post-kiln processes in gross income from mining, as defined; . . ."

(including the one cement case—*Dragon*). The Supreme Court denied certiorari.*

4. Four days following the denial of certiorari in such cement and clay cases, the Treasury issued its Technical Information Release No. 62, announcing that "in view of" such denial of certiorari, the Internal Revenue Service was "taking steps to dispose of pending litigation and claims involving brick and tile clay and cement rock, as required under these decisions".

5. The first *Monolith* case, involving Monolith's 1951 tax year, was tried in early 1958. There the Government expressly and formally admitted that Monolith's processes at least through the pre-kiln "slurry" stage were "includible in determining gross income from mining under Section 114(b) of the Internal Revenue Code of 1939, as amended . . ." [No. 16063, R. 21-23], but argued that kiln and post-kiln processing was not allowable. Although the Government at first contended that Monolith's deposit was "stone", entitled to but a 5% rate, it later abandoned this contention. The Government also contended that the state and national statistics of crushed limestone "sold or used" proved marketability of Monolith's particular type of limestone. However, the district court found that Monolith's particular type of high-calcium lime-

**United States v. Dragon Cement Company,* certiorari denied, 355 U.S. 833 (1957); *United States v. Merry Brothers Brick & Tile Company, et al.* (13 different cases involving the meaning of "mining" decided by the Fifth Circuit consolidated by the Government for purposes of certiorari), certiorari denied, 355 U.S. 824 (1957).

stone was the statutory "calcium carbonates"; that such mineral was not marketable unless and until processed into cement; and that cement was therefore Monolith's depletion base or cut-off. *Monolith Portland Cement Company v. United States,* 168 F. Supp. 692 (S.D. Cal. 1958).

6. Later in 1958, the same district judge who had decided the first *Monolith* case held, in two subsequent cement cases* involving Monolith's principal competitors, that high-calcium cement-type limestone was "calcium carbonates" under the statute and since it was not marketable prior to becoming cement, that finished cement was the correct depletion base (at least for California producers).

Thus, on May 15, 1958, when Monolith filed its complaint for refund for its second tax year (1952) involving the same questions as the year 1951 presented in the first *Monolith* case, *all* decisional law was unanimously to the effect that where concentration by heat processing (such as Monolith's kiln sintering) was required in order to obtain a salable product, such processing was allowable as part of the depletion base. The Government's "manufacturing" vs. "mining" argument had been rejected by the Courts of Appeal, and certiorari had been sought and denied. With regard to cement producers, the picture was even clearer. The "slurry cut-off" endorsed by Treasury Regulations 111 had been rejected and kiln and post-kiln processing expressly approved in *Dragon.* The approved

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**Riverside Cement Company v. United States,* 2 AFTR 2d 6175 (S.D. Cal. 1958); *California Portland Cement Co. v. Riddell,* 3 AFTR 2d 438 (S.D. Cal. 1958).

depletion base for cement producers had been set at finished cement, in view of the factual non-marketability of the particular type of high-calcium limestone required and used to produce cement.* Therefore, in 1958, the Government abandoned its frontal assault in the courts and turned its full attention to Congress. The significant events of the period 1958-1963 are largely legislative, as supplemented by the judicial and administrative events which proceeded therefrom.

Let us now review the significant events** in the period 1958-1963:

7. The Government appealed in the first *Monolith* case. In its appeal, it took the position and represented to this Court that Monolith's particular type of limestone was "calcium carbonates" at 10% and neither "stone" at 5% nor "chemical grade limestone" at 15%. The Government accepted the finding that such "calcium carbonates" type of limestone was not commercially marketable as crushed limestone and that a "commercially marketable product" under the statute was not obtained by Monolith unless such "calcium carbonates" were further processed into cement. The Government's appeal was premised on the theory that by including the kiln and post-kiln processing as part of the depletion base, the court

*In *Dragon*, the Government had conceded on appeal that calcium carbonates were non-marketable, i.e., "that there is no commercial market for cement rock." (244 F. 2d 513, 517). And in the first *Monolith* case the District Court had found as a fact that there was no market for Monolith's "calcium carbonates" (168 F. Supp. 692, 694).

**We will continue to number these events serially, following the numbered events of the 1953-1958 period.

had allowed Monolith double depletion on the small quantities of additives (clay, iron cinders, etc.) mixed with the "calcium carbonates" to form the slurry before the kiln sintering process. [No. 16063, Brief for the United States, pp. 10-19.]

8. In *Monolith Portland Cement Company v. United States,* 269 F.2d 629, 9 Cir., 1959, this Court expressly affirmed Monolith's finished cement depletion base, and rejected the Government's argument for exclusion of the additives from such base. The Court found it unnecessary to decide whether Monolith's particular deposit was "calcium carbonates" at 10% or "chemical grade limestone" at 15%.

9. The Government did not seek certiorari in the first *Monolith* case.* Indeed, it did not even file a petition for rehearing.

10. Following the denial of certiorari in *Dragon* and the other cases, the Government assumed that the principles of such cases were "the existing law".

For example, the Senate and House Reports** explaining why Congress was enacting the 1961 clay legislation expressly precluding the retroactive application of *Cannelton* cite "two budget messages for changes in the tax laws" and

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*The Government advised the district court in the first *Monolith* case that it was a "test case" and the Government was "trying to get to the Supreme Court." [R. 309-310].

**Sen. Rep. No. 903, H. of R. Rep. No. 939, 87th Cong., 1st Sess.

"Statements to Congress on this subject" as evidencing that the Government assumed that percentage depletion could be taken on finished products in cases where the crude mineral was nonsalable. The Reports then quote from the letter of former Secretary of the Treasury, Robert B. Anderson, to the Speaker of the House in 1959, requesting new depletion legislation, as follows:

"Early last year I testified before the Ways and Means Committee on the need *to revise the law* in order to preclude excessive depletion deductions *for the brick and cement industry.* My recommendation was made as a result of a series of court cases which permitted manufacturers of brick and cement to compute percentage depletion on the basis of the selling price of the finished manufactured product rather than on the value of the clay or cement rock before it is manufactured."* (Italics ours)

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*Set out in full in Appendix, pp. 7-8. See Also: Deputy Secretary Smith April 24, 1958 letter to Chairman Mills of the House Ways and Means Committee (set out in full in Appendix, pp. 9-11), which states:

"Secretary Anderson, in testimony before your Committee on January 16, 1958, recommended that *the law be revised* to preclude the allowance of excessive depletion deductions for the brick and cement industries . . .

"Courts have consistently found that the statute entitles taxpayers who are extracting minerals to compute their gross income from the property by including the treatment processes which mine operators would normally apply to obtain the first marketable product . . .

"The enclosed proposed legislation would carry out the secretary's recommendation, with respect to the clay and cement industries, and adopt the prior practice of the Department by delineating between mining and manufacturing processes . . ." (Italics ours.)

11. In 1959 the Treasury settled pending "calcium carbonates"—cement cases (including a case involving Monolith's principal competitor)* on a finished cement basis. The Treasury has not made public the number of cement cases it settled (including the bases therefore and the dollars involved). However, as the House of Representatives pointed out later:**

> ". . . A survey made by the industry from a large sample of the taxpayers in the brick, tile and fire clay industry, for example, suggests that for years prior to 1957, approximately 80 percent of the cases are closed. Thus the Service cannot assess deficiencies in those cases, and to do so in other cases or to refuse claims for refund based upon the same principles would result in a highly discriminatory situation."

In this same connection, many cement-taxpayers (including the Monolith companies) as well as clay-taxpayers "made decisions—as to the price for the product, whether to use funds for plant expansion, to use them for dividend distributions, etc.—on the assumption that the court and Internal Revenue Service interpretation of what the base was for their percentage depletion allowance could be relied upon."***

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*Such settlement occurred after the trial, *Riverside Cement Co. v. United States,* 2 AFTR 2d 6175 (S.D. Cal. 1959) and no appeal was taken.

**H. of R. Rep. No. 939, 87th Cong., 1st Sess., pp. 5-6

***H. of R. Rep. No. 939, 87th Cong., 1st Sess., p. 6

12. The Second *Monolith* case.

In late 1959, the *Midwest* case and the second *Monolith* case were at issue. The Government formally admitted that "We know of no 'limestone industry' nor any designation by it for rock of the type mined by the plaintiff" [R. 96], and that the mineral deposit, processes and markets were the same in the second case as in the first *Monolith* case [R. 66, 79, 91-92].

The District Court, finding all the facts to be undisputed, and taking judicial notice of the first *Monolith* case, entered a judgment in Monolith's favor on December 23, 1959, computed upon a finished cement depletion base and a 10% "calcium carbonates" rate subject to the statutory 50% of net limitation. [R. 168-186]. The District Court expressly held that *res judicata* and collateral estoppel precluded the Government's attempted relitigation of the facts of the character of Monolith's mineral deposit, the allowability of the processes and the available market. [R. 169]. However, the court also alternatively ruled that, on the merits, Monolith's deposit was "Calcium Carbonates" and the correct depletion base was finished cement. The Government thereafter perfected an appeal to this Court.

13. Almost all of the post-1953 percentage depletion litigation involved industrial minerals for which there was no market in crude or raw form and which had to be processed in order to obtain a "commercially marketable mineral product." Early in 1960, in discussing the question of statutory classification of such minerals,* Edward

*Rustigan, *Calculation of Percentage Depletion: What is Income,* 18 N.Y.U. Institute on Federal Taxation 543 (1960).

C. Rustigan, Assistant Head, Treasury Department Legal Advisor Staff, had this to say:

"There is still a third important category of minerals, which is not covered by the statutory definition of the term 'ordinary treatment processes.' This category includes minerals, like some clays, which are not customarily sold in the form of a crude mineral product (so that they do not fall in the first of the broad statutory categories)."

* * * * *

". . . The minerals which fall into this category in turn may be divided into two distinct groups. The first of these groups includes any mineral which is not marketable in crude form and, is not marketable at any stage before the mineral is put into the form of a manufactured end product. The second group includes any mineral which is marketable either in crude form or in some processed form prior to the stage when it is put into the form of a manufactured end product."

* * * * *

"*The principal examples of minerals in the first group (minerals for which there is no market prior to the manufactured end product) are ordinary brick and tile clay and cement rock* . . ." (Emphasis supplied.)

14. While the Government's appeal in the second *Monolith* case was pending, the Supreme Court granted certiorari and reversed the Seventh Circuit in the case of *United States v. Cannelton Sewer Pipe Co.*, 364 U.S. 76 (1960). The Court

of Appeals had held that not only must the miners of the depletable mineral in question *as a class* obtain a commercially marketable mineral product, but that all the processes applied by the *individual* taxpayer-miner to obtain a product *he* could sell *at a profit* were allowable. (268 F.2d 334, 336).

The Supreme Court explicitly rejected such "individual profitability" rule, expressly resting such ruling on the finding that there was an *actual* local market for the taxpayer's type of fire clay—that over 60% of all the fire clay produced in the Indiana-Kentucky area (including "large sales of fire clay and shale" directly "across the river from respondent's plant"—a distance of but 7 miles) was sold in crude form and that such fire clay was hence "customarily sold in the form of a crude mineral product." §114(b)(4)(B)(iii)* 364 U.S. 76, 80, 86.

The Supreme Court expressly refused to follow the Government's request that the prior "commercially marketable" cases (including the *Dragon* and *Monolith* cases) also be overruled, stating that such decisions were not "apposite" and were "all distinguishable", noting that only 2 of such cases (which the Court *did* disapprove) adopted the "profitability test". 364 U.S. 76, 89.

15. At the same time that the Supreme Court decided *Cannelton,* Congress was debating the then current (1960) Treasury proposal to revise the

*No question of the allowability of any processes specifically set out in §114(b)(4)(B)(iii) as part of the depletion base was present or raised in *Cannelton.*

depletion law for cement producers. The same week that *Cannelton* was decided (June, 1960) Congress changed the law and provided that for post-1960 years, the cut-off or depletion-base for cement producers should be at the pre-kiln stage. Section 302(b) of the Public Debt & Tax Rate Extension Act of 1960 (P.L. 86-564, 74 Stat. 292).

16. Thereafter, in September, 1960, Congress attempted to cut the Gordian knot which the Supreme Court had declined to attempt to unravel in *Cannelton**. By an amendment to the earlier "kiln-feed" statute Congress provided that cement taxpayers who were weary of litigation could buy their peace and use a kiln-feed cut-off for pre-1961 tax years as well as later years if they so desired. Section 302(b) P.L. 86-564, 74 Stat. 292, as amended by the Act of September 14, 1960, P.L. 86-781, 74 Stat. 1017, Sec. 4.

In the report which accompanied the Amendment, it was explained that those cement producers who did not desire to so compromise their claims would have their depletion base determined "in accordance with existing law". S. Rep. No. 1910, 86th Cong., 2nd Sess., pp. 8-12.**

17. Following *Cannelton,* the Treasury attempted to apply its interpretation of the decision retroac-

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*The Supreme Court had expressly declined to disapprove the finished cement depletion base cases in its *Cannelton* opinion.

**See discussion in this Court's opinion, 301 F. 2d 488, 495-496.

tively to other clay producers (including those who had won the earlier cases the Supreme Court had declined to disapprove in *Cannelton*). Congress reacted with legislation "overruling" *Cannelton*. By such legislation, premised upon the inherent unfairness of any retroactive application of *Cannelton* to taxpayers who had relied upon the earlier decisions denied certiorari, Congress provided for a finished product cut-off (not to exceed $12.50/ton). P.L. 87-312 (H.R. 7057, S. 2289). Thus, the depletion base of the fire-clay producer—Cannelton—which was lowered to $1.90/ton by the Supreme Court (364 U.S.76, 80) was raised to $12.50/ton by Congress.

18. Relying upon all the foregoing events, but particularly:

a. The first *Monolith* case and *Dragon;*

b. The Government's consistent position 1953-1959 that the correct cement cut-off was at least kiln-fed (not crushed limestone);

c. The Treasury's formal, published admission that cement-type limestone was not customarily sold in crude (crushed) form;

d. The Supreme Court's express refusal to disapprove *Dragon* and *Monolith* in its *Cannelton* decision;

e. The Government's assertion that there is no "limestone industry" nor any designation by it for rock of the type mined by Monolith; and

f. The clear Congressional intent that *Cannelton* should not be applied retroactively, in November, 1960, the two Monolith companies elected to have their depletion bases determined "in accordance with existing law", and did not elect the kiln-feed cut-off.*

19. In March, 1962, this Court issued its decision in the second *Monolith* case (301 F.2d 488) affirming a cement depletion base, on the grounds that:

a. A correct construction of the statute required such a result and *Cannelton* was "distinguishable" (301 F.2d 488, 494-495);

b. The "existing law" governing Monolith's 1952 depletion base was *Dragon* and the first *Monolith* case (301 F.2d 488, 496);

c. In the face of the apparent issues of public policy and the Supreme Court's express refusal to do so, this Court would not "extend" *Cannelton* to cement cases (301 F.2d 488, 496-497);

d. The "non-retroactivity" rule of *James v. United States,* 366 U.S. 213, foreclosed the retroactive application of a 1960 Supreme Court decision to the tax year 1952 so as to wipe out a decade of lower-court deci-

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*Treasury Regulations Sections 1.9003-1.9003-5, 25 F.R. 8904, September 16, 1960.

sional law upon which the taxpayer had relied in shaping its economic activity (301 F.2d 488, 497).

The Court also indicated that although it agreed with "the district court's conclusion that *res judicata* and collateral estoppel bar consideration of appellant's contentions", it, too "preferred to go to the merits of the issues" (301 F.2d 488, 498).

20. After obtaining several extensions of time, the Government finally applied for certiorari in October, 1962, from this Court's second *Monolith* decision. During the interim (March-October, 1962), the case of *Monolith Portland Midwest Company v. United States* was set for trial and tried in the district court. Judgment was rendered for Midwest on a finished cement depletion basis. [No. 18505, Clk. Tr. pp. 1292 et seq.].

Following the Monolith companies' election to rely upon "existing law" as allowing them a finished cement depletion base, the following developments occurred in the pending litigation:

21. The Government's Petition for Certiorari, in *Monolith,* filed in October, 1962, misleadingly described the "Question Presented" as follows (Petition, p. 2):

"Whether, for the purpose of computing the percentage depletion allowance on limestone,

'mining,' as defined in Section 114(b)(4)(B) of the Internal Revenue Code of 1939, includes the processes employed by an integrated miner-manufacturer to manufacture cement."

This "Question" should be compared with the "Question" in *Dragon* and *Cannelton.* (See fold-out sheet)

22. On January 15, 1962, by a summary, per curiam opinion without briefing or argument, the Supreme Court granted certiorari, and, on the certiorari papers alone, reversed this Court's judgment in *Monolith,* and remanded the case "for disposition in accordance with this opinion" to the district court. *Riddell v. Monolith Portland Cement Co.,* 371 U.S. 537, 9 L.ed. 2d 492. [R. 776].

In its opinion the Supreme Court discussed and decided only the question of statutory interpretation presented by the Petition for Certiorari —whether "mining" "limestone" included ordinary cement processing, when "limestone" was sold in large quantities.

The Court held that it did not, concluding that the general "limestone" statistics for the United States and California showed that when Monolith's "limestone" reached the crushed stage it was "marketable in that form" and hence "mining" terminated.

The Supreme Court did not:

a. Consider the question of "existing law";

b. Consider the question of non-retroactivity;

c. Consider the question of *res judicata* and collateral estoppel;

THE GOVERNMENT'S "QUESTION PRESENTED"

In *Dragon, Cannelton*, and *Monolith*

Dragon*

"Whether 'gross income from mining', on the basis of which percentage depletion for mineral deposits is allowable under Sections 23(m) and (n) and 114(b)(4) of the Internal Revenue Code of 1939, includes income derived from manufacturing merely because the mine owner, in addition to engaging in mining activities, transforms the mineral into a manufactured product and sells it as such."

"The answer depends on whether the mine owner's manufacturing operations are to be considered 'ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product', within the meaning of Section 114(b)(4)(B)."

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*The "Question in the *Merry Brothers* group of cases was identical. As the Government said: (*Dragon* Petition, p. 5) "This case presents the same important question of statutory construction as *United States v. Merry Brothers* . . ."

Cannelton

"Under the Internal Revenue Code, miners of designated minerals are entitled to a depletion allowance determined by applying a specified percentage to the taxpayer's gross income from 'mining'. 'Mining' is defined as including 'the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products * * *'

"The question presented by this case is whether the commercially marketable products, for purposes of determining taxpayer's allowance for mineral depletion, are fire clay and shale (the cut-off point for all nonintegrated miners of these minerals) or whether, as held below, taxpayer may include in its gross income from 'mining' the proceeds received from sale of sewer pipe and other finished products of its factories."

Monolith

"Whether, for the purpose of computing the percentage depletion allowance *on limestone*,* 'mining,' as defined in Section 114(b)(4)-(B) of the Internal Revenue Code of 1939, includes the processes employed by an integrated miner-manufacturer to manufacture cement."

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*There is, of course, no provision for depletion on "limestone" in the 1939 Code here involved.

d. Consider the statutory conflict created by the Court's apparent impression that all "limestones" were legally identical, despite the Congressional sub-classification of the many different limestones ("stone", "marble", "dolomite", "calcium carbonates", "chemical grade limestone", "metallurgical grade limestone") in Section 114(b)(4)(A) as *different* minerals for depletion purposes.

e. Consider the question of whether, in any event on this record, Monolith was entitled to a kiln-feed cut-off—the basis upon which its 1952 tax was audited, determined, and paid and from which the refund suit was prosecuted, i.e., whether the question of a "crushed limestone" depletion base was moot because the Government had *never* cross-complained for a deficiency predicated on a crushed limestone base.

Specification of Errors.

1. The District Court construed the mandate of the Supreme Court as a command to hold that Monolith's 1952 percentage depletion base was its constructive income from crushed "limestone". This construction was erroneous, since:
   a. The Supreme Court neither considered nor decided the alternative bases for the judgment of the lower courts—"existing law", non-retroactivity, *res judicata* and collateral estoppel;
   b. The Supreme Court neither considered nor decided the other substantial questions created by its construction of the statutory term "mining" but not presented on the certiorari papers.
2. The District Court failed to follow this Court's law of the case in those particulars unaffected by this Supreme Court's reversal.
3. The District Court's findings of fact are clearly erroneous, in that they apply an incorrect legal standard.

Questions Presented.

1. Does the summary, per curiam grant of certiorari and reversal by the Supreme Court of a judgment of a court of appeals on the certiorari papers alone, on but one of the several alternative grounds of decision expressed by the court of appeals, operate as anything other than an adjudication of the question in terms discussed and decided, leaving all other questions in full effect until changed by the Court of Appeals itself?

2. Do the rulings by a court of appeals in its opinion, neither expressly nor impliedly reversed or disapproved by the Supreme Court when reversing the judgment of the court of appeals upon a single point, continue to bind the district court as the "law of the case"; or, is the district court freed of all obedience to the court of appeals in further proceedings merely because of the Supreme Court's reversal?

3. Where an opinion of the Supreme Court is silent as to other substantial questions either present in the case but not considered in the opinion, or created by such opinion but not considered, is the district court on remand free to ignore such unanswered questions?

ARGUMENT.

I.

Preliminary Statement.

Mankind's progress is measured in minerals. However, the world's vital dependence upon mineral resources is a comparatively recent development—a product of the Machine Age.* Today minerals provide the metals from which machines are made and the fuels and power that impel them, besides supplying the raw materials for countless industries. Minerals are thus indispensable to the normal industrial life of any nation; and because industry is the keystone to military security in these days of increasingly mechanized warfare, mineral supply occupies a position of priority in the national planning of industrialized nations.

The Amercan economy—the most industrialized in the world today—presents a striking example of the importance of minerals and the appreciation of that basic fact. The American economy is distinguished by a high per capita consumption of minerals.** In this country, most informed persons are conscious of the fact that our mineral resources are being used up at a constantly and almost unbelievable rate. The report of the Advisory Committee on Minerals Research to the Na-

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*"The present era has been called by many the Machine Age . . . Whether the machine is a watch, an automobile, a hydraulic press or a drawbridge, its essential parts are almost sure to be of mineral origin." *Economics of the Mineral Industries,* A.I.M.E., 1959, p. 2.

**If all the world's peoples were to achieve the per capita use rate now existing in the United States, world mineral production would have to be increased sevenfold. (Hubert & Flock, *Natural Resources,* McGraw Hill, N. Y., 1959.)

tional Science Foundation* begins its second paragraph with the remark, ". . . In the prosperous twenties C. K. Leith called attention to the fact that mineral production since 1900 had exceeded the entire mineral output from the dawn of history to the end of the 19th century. In 1955 we can again claim that within the past quarter century more minerals have been extracted from the earth than in all preceding history." It is clear that "This mounting strain upon resources that cannot be replaced has become the most challenging aspect of our present economy."**

In the field of mineral exploitation, the localized and unpredictable nature of mineral occurrence creates uncertainties concerning the success of business ventures in exploration and production. The commercially successful efforts to explore for and develop mineral deposits comprise an exceedingly small percentage of the total and the mortality of production projects is also high. As a consequence, investment in the mineral industries involves considerably more than the average hazards of business in general.

The other primary characteristic of the mineral industries is the non-renewability or depletion of the raw materials used. Nearly all mineral resources are capital resources; once used up they are not renewed.***

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*Report of the Advisory Committee on Minerals Research to the National Science Foundation, 1956, p. 1.

**Report of the President's Materials Policy Commission, *Resources for Freedom,* Vol. I, p. 5, 1952 (often referred to as the Paley Report).

***Mouzon, *International Resources and National Policy,* Harpers, N. Y., 1959, p. 224; Huberty & Flock, *Natural Resources,* McGraw Hill, N. Y., 1959; *Economics of the Mineral Industries,* A.I.M.E., N.Y., 1959; Van Royen & Bowles, *The Mineral Resources of the World,* Prentice-Hall, N.Y., 1952.

Aware of the great complexity of the situation, Congress has long labored in an effort to provide a fair depletion deduction to mineral producers. Such policy was grounded in the social, economic and military roots of the consequences of a national minerals deficiency. Quite understandably, the Congressional policy has been heavily attacked.

Failure to recognize the economic hazards in mining and bringing mineral resources to market and to allow an adequate depletion deduction which will fairly compensate the producer destroys the incentives needed to achieve success in the development of a sound national minerals policy. Without such success on the part of individual miners—particularly the smaller, non-integrated independent producers, the benefits of an abundant supply of cheap mineral raw materials to meet man's ever increasing needs would soon diminish.

While in comparison with the exotic rocket fuels and metals, cement is a pedestrian mineral commodity, millions of tons are needed to satisfy the growing needs of our economy for housing, industry and highways, and an adequate depletion provision must be made for cement producers who must handle more tonnage of raw material to obtain a salable product than any other industry. Appellants respectfully submit that Congress did so pro-

vide such a modest allowance in the 1951 Revenue Act* and that in reliance thereon and in the decade of judicial decisions which followed, the Monolith companies made expenditures and incurred costs which cannot now, in honor, be repudiated by the Government which induced them.

II.

The Questions of Non-Retroactivity, "Existing Law", Res Judicata and Collateral Estoppel Were Not Presented to the Supreme Court and Were Neither Considered nor Decided in That Court's Opinion and Mandate. The District Court Erred in Failing to Consider Such Questions Upon Remand, and Failing to Follow This Court's Decision of Such Questions.

A. Introductory Statement.

As previously pointed out, the Supreme Court disposed of this case summarily upon the certiorari papers. No briefs on the merits were filed and Monolith had no opportunity to present to the Court the full merits of any of the additional questions which still remained unanswered.

As shown by the Government's Petition** and the Supreme Court's Opinion,*** the ground of decision was the Supreme Court's holding that the "mining" of "limestone" under Section 114(b)(4)(B) did not include the treatment processes customarily and necessarily

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*Since one ton of calcium carbonates limestone will yield about 3 barrels of cement [R. 81], a 10% depletion rate applied to a base of $2.50/bbl. of cement would yield something less than 75¢/ton of calcium carbonates. Such an allowance compares favorably with the higher allowances enjoyed by clay producers and other miners. For example, the clay products producer in *Cannelton* (364 U.S. 76) enjoys an allowance of $1.25/ton fire clay.

**Appendix, pp. 12-28.

***R. 774.

employed to produce cement in the face of the record fact that large quantities of "limestone" were sold in crushed form in California and the United States. The decision was predicated upon the rule in *Cannelton* which the court now held "controlled" this case.

Although this Court held that the *Cannelton* rule did not apply to this case and that as a matter of statutory interpretation Monolith's cement making processes were allowable as ordinary treatment processes encompassed within the statutory term "mining" (301 F.2d 496), it also held that under the *James* case, the retroactive application of any contrary statutory interpretation was precluded by the doctrine of non-retroactivity (301 F. 2d 497); and that the "existing law" Congress provided for non-electing cement taxpayers under the Act of September 14, 1960 was the *Dragon* and first *Monolith* cases. (301 F.2d 496). Furthermore, it indicated that it approved the District Court's findings and conclusion that the Government was barred from asserting a crushed limestone base in this case by *res judicata* and collateral estoppel, although it too "preferred to go to the merits of the issues" (301 F.2d 498).

None of these three questions were presented to, considered by or decided by the Supreme Court. The sole and single question presented to, considered by and decided by the Supreme Court was the precise question of proper statutory interpretation placed before it by the Government in its Petition (pp. 27-28 *supra*).

B. The Supreme Court's Reversal in Monolith Was Not an Adjudication of Issues Not Presented to or Decided by the Supreme Court.

It has long been settled that a court's decision of an appeal is not an adjudication by the Court of any other than the issue actually discussed and decided.

As the Supreme Court itself has taught us in *Mutual Insurance Co. v. Hill,* 193 U.S. 551 (1904):

> ". . . When a case is presented to an appellate court it is not obliged to consider and decide all the questions then suggested or which may be supposed likely to arise in the further progress of the litigation. If it finds that in one respect an error has been committed so substantial as to require a reversal of the judgment, it may order a reversal without entering into any inquiry or determination of other questions. While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded,—even though all are not specifically referred to in the opinion,—yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided."

See also:

Charles Wolff Packing Co. v. Court of Industrial Relations, 267 U.S. 552 (1925);

Communist Party of U.S. v. Subversive Activities Control Board, 254 F.2d 314 (CA, DC, 1958);

Christoffel v. United States, 214 F.2d 265 (CA, DC, 1954);

Washington Gas Light Co. v. Baker, 195 F.2d 29 (CA, DC, 1951);

Rector v. Massachusetts Bonding & Insurance Co., 191 F.2d 329 (CA, DC, 1951).

This settled principle—that a reversal is authority only for what is actually decided—is strengthened in this case by the Supreme Court's use of the summary, per curiam technique.

Such summary reversal upon the granting of a petition, which has become an increasingly frequent practice, has drawn increasing criticism from neutral observers.*

Had the Supreme Court granted certiorari here in the normal way, and received briefs and arguments on the merits, it is certain that the Court could not have escaped some discussion of the merits and of the alternative grounds of this Court's opinion. Instead, relying entirely upon *Cannelton* (which did not present

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*See, e.g., references collected in Stern & Gressman, Supreme Court Practice (3rd Ed.), p. 187. As Stern & Gressman put it:

> "The summary per curiam practice, unless narrowly confined to the most obvious situations, contains an element of unfairness toward the parties, and particularly toward the respondents. Time and again the Court and individual Justices, as well as outside observers (including these authors), have admonished the bar that the brief in opposition should be short and addressed to why certiorari should not be granted rather than to the merits of the case. Even though the merits may be discussed, the preferable treatment is normally summary rather than complete. On the basis of such advice and practice, counsel for a respondent has come to assume that he will have a chance to brief the case fully and argue orally before a case will be decided against him. But summary reversal on the certiorari papers deprives him of this opportunity. He can, of course, partially protect his client by presenting a complete statement of his argument in the brief in opposition. But in the vast majority of cases not disposed of summarily this would mean additional and unnecessary work for the lawyer, expense to the client, and unessential reading matter for the already overburdened Court."

the additional questions involved in *Monolith*), the Supreme Court extended the *Cannelton* interpretation of the statute to cement producers. The remaining questions were not only not considered—they were never presented—since Monolith's attempted presentation of such questions was foreclosed by the Court's summary, per curiam opinion.

The narrowness of the actual question presented in *Monolith,* and of the Supreme Court's consideration, is shown by the Supreme Court's erroneous assumption that the question in suit was that of a finished cement depletion base vs. a crushed limestone base. Actually, of course, the question was whether Monolith was entitled to a refund of the difference between the taxes it had paid on a kiln-feed depletion base, as required by the 1953 Regulations, and the taxes on a finished cement basis it claimed. There never was a claim by the Government in the record of the case as tried that the kiln-feed base taxes paid by Monolith were insufficient, and the question the Government put forward and argued to the Supreme Court was new.

C. This Court's Alternative Grounds of Decision, Neither Considered nor Decided by the Supreme Court, Were Still Part of the "Law of the Case".

It is well-established that a lower court is forever bound by all points decided by an appellate court in the same case, under the doctrine of "law of the case". Thus, as the Supreme Court pointed out in *Insurance Group Comm. v. Denver & R. G. W. R. Co.,* 329 U.S. 607 (1947):

> ". . . When matters are decided by an appellate court, its rulings, *unless reversed by it or a superior court, bind the lower court.* Thus a cause proceeds

to final determination. While power rests in a federal court that passes an order or decision to change its position on a subsequent review in the same cause, orderly judicial action, except in unusual circumstances, requires it to refuse to permit the relitigation of matters or issues previously determined on a former review." (Italics Ours)

See also:

United States v. United States Smelting R. & M. Co., 339 U.S. 186 (1950);

Oklahoma Natural Gas Co. v. Concho Const. Co., 209 F.2d 269 (CA 10, 1953);

United States v. Tuffanelli, 138 F.2d 981 (CCA, 7, 1943);

United States Rubber Co. v. General Tire & Rubber Co., 128 F.2d 104 (CCA 6, 1942).

Since the Supreme Court neither considered nor decided the merits of this Court's alternative grounds of decision, the district court owed a duty of obedience to this Court as well as the Supreme Court, which it did not fulfill.

Although this Court considered the merits of the other questions not presented to nor decided by the Supreme Court, and its decision thereof should have been applied by the district court, we shall now once again review the merits of these additional questions (supplementing the discussion thereof in our brief on the prior appeal)*, and demonstrate that the Court's original decision of such questions was correct and

*Appellee's Brief No. 16914, pp. 53-78.

should be adhered to, notwithstanding the Supreme Court's decision in *Monolith,* upon another issue.

We shall first discuss the doctrine that a judicial decision which changes the settled interpretation of a statute has the same legal effect as a legislative amendment—and that when a litigant has shaped its conduct in reasonable reliance upon such earlier settled interpretation the new rule should be given only prospective application.

We shall next show that when Congress provided that "existing law" was to govern those cement producers who elected such procedure, a taxpayer who made an election based upon the then current judicial interpretation of "existing law" is denied the rights Congress granted it, if the interpretation of such law is later judicially changed, after the election has become irrevocable.

Finally, we shall demonstrate that even under the restrictive limitations on the doctrines of *res judicata* and collateral estoppel imposed by *Commissioner v. Sunnen,* 333 U.S. 591, such doctrines are properly applicable here, and bar the retroactive application of a rule different from that announced in earlier, identical cases, upon which the taxpayer relied.

Since the remaining questions—statutory types of limestone, allowability of "sintering" under § 114(b)-(4)(B)(iii), "representative field price," etc.—arise only if the case is not disposed of upon one or more of the three major questions, we shall discuss such questions only in passing.

III.
Retroactivity.

A. Introduction.

The most important single question in this case is whether the new construction of Section 114(b)(4)(B) by the Supreme Court, in holding that cement producers' depletion was "controlled" by *Cannelton* should be applied retroactively,* i.e., whether the deprivation of Monolith's rights which had accrued prior to the Supreme Court's decision was: (1) intended by the Supreme Court; and (2) in any event, consistent with constitutional principles.

The principle that laws should not apply to events which occurred before their passage dates at least from Roman times. Cicero berated Verres for making retroactive a provision of the *Lex voconia* and the Justinian Code repeated a prohibition of retroaction as settled law (bk. 1;14,7). Bacon (*Maxims,* Reg. 8) and Coke (2 Inst. 292) established it as an ancient maxim of the English common law long before Blackstone. Since the *Code Napoleon,* codes in civil law systems (such as present French law) have admonished law administrators that laws are to have only a prospective effect. In English law, where Parliament is avowedly not restricted in its power to pass retroactive legislation, the judges have for centuries reiterated that no legislation should be interpreted retroactively unless the intention

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*A retroactive law is one "which changes or injuriously affects a present right by going behind it and giving efficacy to anterior circumstances to defeat it, which they had not when the right accrued." Argument of counsel in *Poole v. Fleeger,* 36 U.S. 185, 198, 9 L.ed 680, 686 (1837).

of the legislature that it should be so construed is expressed in clear, plain and unambiguous language.*

Doubtless, the most important reason why all retroactive laws do violence to our sense of justice is the want of notice to those whose legal relations are affected thereby. We have a feeling that men should know what the law is so that they can regulate their conduct accordingly. After a man has acted on the assumption that the law is as it appears at the time of the act, it is harsh treatment to put him in default by retroactive legislation. "Only in proportion as the conception a man has of [the law] is clear, correct and complete," said Bentham**, in 1817, in urging the States to codify their laws, "can the ordinances of the law be conformed to, its benefits claimed and enjoyed, its perils avoided." To so inform the subject, in his opinion, was one of the "most important duties of the government." The law must be accessible. It must not, like that of the Roman Emperor Caligula's, be written in small characters and hung upon high pillars out of view so as to ensnare the people.

This element—lack of notice—has peculiar application where the party has demonstrably made a choice and shaped his affairs in reliance upon what the law was at that time. Such reasonable expectations of the law's stability lie at the heart of most business activity, particularly today when even the small businessman wants to know the tax effect of his proposed transactions.

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*This, of course, is also the American rule. *Shwab v. Doyle,* 258 U.S. 529 (1922).

**IV Bentham, *Collected Works* (Edimburgh, 1843) p. 473.

Therefore, the most important inquiry to be made is whether the claimed retroactive rule gives effect to or defeats the bona fide intentions or reasonable expectations of the persons affected, whether it lines up with the intervening course of events or assumes to turn them aside, whether it places the stamp of legality on that which was theretofore illegal or stamps as illegal that which was theretofore legal, whether it affirms or disaffirms the status quo.

"Wherever expectations have been raised in accordance with the declared purpose and concession of the State," says Austin, "to disapppoint those expectations by recall of the concession without a manifest preponderance of general utility is . . . pernicious"*

"The layman", says Cardozo, cares little about legal logic and has never had occasion to make a legal survey, but "What is important to him is that the law be made to conform to his reasonable expectations". Cardozo, *Address to the New York Bar Association* (1932) N.Y. Bar. Ass'n. Report, p. 263.

Or, as Bentham put it, "Events so far as they depend upon laws, should conform to the expectations which law itself has created."**

As discussed above, the Supreme Court's failure to consider or decide the question of retroactivity left such question applicable upon the remand proceedings, under the doctrine of *Mutual Life Ins. Co. v. Hill,* 193 U.S. 551. However, the district court (erroneously, we submit) construed the mandate as foreclosing *all* other questions in the case.

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*2 Austin, *Jurisprudence* (1874) §1138

**Bentham, *Theory of Legislation,* Rational Basis of Legal Institutions, 211

It is Monolith's position that when, as here, a decision of the Supreme Court extends a statutory interpretation to cover a case theretofore expressly held "distinguishable," that the new rule should not be held retroactive; but that only prospective application should be accorded to it.

This Court's prior opinion recognized the impropriety of retroactive application of the *Cannelton* rule to Monolith after Monolith, relying upon *Dragon* and the first *Monolith* case, had lost its right to elect a kiln-feed cut-off.

However, the Supreme Court did not consider or decide whether the retroactivity issue was meritorious, and thereby, in legal effect, approved this court's decision thereon.

To place this question in its true perspective we shall first discuss the present state of the law as to the doctrine of prospective overruling, and then apply such law to the facts of this case showing that Monolith's reliance upon the first *Monolith* case was reasonable,* and that the present case is peculiarly one calling for the application of the principle of non-retroactivity.

B. Introductory Statement—The Retreat From Retroactivity.

The general theory that judicial decisions as distinguished from statutes are in their nature retrospective may be traced at least to Blackstone. Stated simply, Blackstone's argument was that the duty of a court is

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*The facts relating to reliance are also set out at pp. 13-25 heretofore.

not to "pronounce a new law, but to maintain and expound the old one."* The theory proceeds on the premise that in deciding a case a judge is bound to *find* the law as it existed when the controversy arose and to *declare* it as being the controlling principle in the case.** This fiction—that judges merely apply the law as they find it, has been challenged by those who pointed out that judges as much as legislators exercise an "ineluctable law-creating function",*** and that to say that judges "find" the law discourages open and honest analysis of what courts do in fact.**** For example, Austin belittles "the childish fiction, employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose from eternity, and merely declared from time to time, by the judges." 2 Austin, *Jurisprudence* (1874) § 919.

The Blackstonian theory continued with the further premise that if a decision was *declaratory* it necessarily had retrospective effect, i.e., if the decision interpreted the law, it did no more than declare what the law had always been.***** On this basis, it was believed that the overruling decision did not declare that the old law was bad law—but that it was not and had never been the law.†

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*1 Blackstone, Commentaries 69 (1769)

**Gray, the Nature and Sources of Law, note 2 at 93

***Levy, Realist Jurisprudence and Prospective Overruling, 109 U. Pa. L. Rev. 1, 2, 6 (1960); Cardozo, The Nature of the Judicial Process.

****Frank, Courts on Trial (1949); Frank, Law and the Modern Mind (1939); Llewellyn, The Bramble Bush (1930).

*****Shulman, Retroactive Legislation, 13 Encyc. Soc. Sci. 355, 356 (1934)

†Blackstone, Commentaries, 68-71 (1769).

This Blackstonian or common-law theory exerted compelling influence upon early American law and resulted in the repeated recitation of the declaratory nature of law. Indeed, such statements are found in the decisions within the last 25 years.*

However, it gradually became clear that the Blackstonian theory in most cases did not square with the American judicial facts of life wherein the law followed our increasing complex economy and society. It thus became necessary for courts to adopt judicial methods which more closely approached the achievement of substantial justice by respecting *bona fide* expectations. The courts gradually worked out the theory of "prospective overruling"—the judicial technique by which a court—desirous of overruling a precedent but reluctant to damage the parties who relied thereon**—applies that precedent in deciding the particular case before it but simultaneously announces that it shall consider it as overruled in all future cases.***

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*See, e.g. *Legg's Estate v. Commissioner,* 114 F. 2d 760, 764 (4th Cir. 1940) ("Decisions are mere evidences of the law, not the law itself; and an overruling decision is not a change of law but a mere correction of an erroneous interpretation.")

**Two other factors which influence courts to the use of "prospective overruling" are: 1) the desire, similar to that which led to the *Erie R.R. v. Tompkins* line of decisions in the past 25 years, to avoid fortuities of the litigation process (such as selection of particular cases, by a litigant with many similar cases, to be fought as "test" cases; or the time lags of trial and appeal causing Statutes of Limitation to run against application of the new interpretation of the law to other transactions causing different results to arise from the same original circumstances) and 2) the desire, often expressed as such, to provide a climate of reasonable legal certainty in which economic and social affairs may be conducted.

***See Cardozo, The Nature of the Judicial Process, 142-167 (1921); Cardozo, Address Before N.Y. State Bar Ass., 55 Rep. N.Y. State Bar Ass'n 263, 296.

Let us examine the judicial retreat from strict retroactivity—the American modification of the Blackstonian theory of the declaratory nature of law.

One example of an area where the courts were moved to apply their decisions retrospectively only was the validity of legislative divorces. If legislative divorces were declared invalid (and they were) by the courts, a retroactive application would destroy the legal status of innocent persons who had relied upon the legislative divorces. A typical case is *Bingham v. Miller,* 17 Ohio 445 (1848). There the Court declared legislative divorces invalid as beyond the legislature's power, but expressly refused to make such rule retroactive, stating:

> ". . . And in view of this [reliance], we are constrained to content ourselves with simply declaring that the exercise of the power of granting divorces, on the part of the Legislature, is unwarranted and unconstitutional . . .
>
> "We trust we have said enough to vindicate the constitution, and feel confident that no department of State has any disposition to violate it, and that the evil will cease."

Another example of this technique is found in the municipal bond cases which came before the Supreme Court. The facts in *Gelpcke v. Dubuque,* 68 U.S. (1 Wall.) 175 (1863) are typical of the others. There, the Supreme Court of Iowa had long held that the legislature could authorize municipal issuance of bonds in aid of railroad construction. However, after the city of Dubuque had so issued authorized bonds the state supreme court reversed itself, and held that the legislature lacked such power and the bonds were invalid.

When the city refused to make payment to Gelpcke, a purchaser, he brought suit in an Iowa federal court. While "not unmindful" that in Iowa such bonds would be held invalid, and the general rule that it follow state court construction and not "make" (or "find"?) its own interpretation of general common law, the Supreme Court held the bonds retrospectively valid, stating:

> "However we may regard the late [overruling] case in Iowa as affecting the future, it can have no effect upon the past. 'The sound and true rule is, that if the contract, when made, was valid . . . its validity cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law.' *Ohio Life & Trust Co. v. Debolt,* 16 How., 432."
>
> "The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal . . ."
>
> ". . . We shall never immolate truth, justice and the law, because a State tribunal has erected the altar and decreed the sacrifice."

Mr. Justice Miller, dissenting, clearly saw the implications of the majority's decision. Conceding the great "moral force" of the majority's position, he reasoned in classical Blackstonian tradition that the authorizing statute and the prior decisions upholding it "was not, and never had been, the law."

As Justice Holmes later said of *Gelpcke,* "The principle is that a change of judicial decision after a contract has been made on the faith of an earlier one the other way is a change of the law."*

Later cases continued to stress the reliance the parties had placed upon the overruled decision as the only legal guide available at the time they entered a transaction.** Some tried to rationalize the departure from Blackstonian retroactivity by analogizing the new decision to a legislative amendment. Thus, in *Douglass v. County of Pike,* 101 U.S. 677 (1880), another municipal bond case like *Gelpcke,* the Court said: (p 687)

> "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are con-

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**Kuhn v. Fairmont Coal Co.,* 215 U.S. 349, 371 (1910) (dissenting opinion)

**See, *e.g., Anderson v. Santa Ana,* 116 U.S. 356 (1886); *Green County v. Conness,* 109 U.S. 104 (1883); *New Buffalo v. Iron Co.,* 105 U.S. 73 (1882); *Taylor v. Ypsilanti,* 105 U.S. 60 (1882); *Moores v. National Bank,* 104 U.S. 625 (1882); *Railroad Co. v. McClure,* 77 U.S. (10 Wall.) 511 (1871); *The City v. Lamson,* 76 U.S. (9 Wall.) 477 (1869); *Havemeyer v. Iowa County,* 70 U.S. (3 Wall.) 294 (1862). See also *Hill v. Atlantic & N.C.R.R.,* 143 N.C. 539, 55 S.E. 854 (1906); *Haskeff v. Maxey,* 134 Ind. 182, 33 N.E. 358 (1893). *Contra, Norton v. Shelby County,* 118 U.S. 425 (1886). More recent cases include *Sutter Basin Corp. v. Brown,* 40 Cal. 2d 235, 253 P. 2d 649 (1953) and *Reppel v. Board of Liquidation,* 11 F. Supp. 799 (E.D. La. 1953). Cf. Catlett, *The Development of the Doctrine of Stare Decisis and the Extent to Which it Should Be Applied,* 21 Wash. L. Rev. 158, 167 (1948)

> cerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

The cases just discussed illustrate the departure from retroactivity in order to protect the social values represented by personal status or commercial arrangements created in reliance upon judicial decisions subsequently held erroneous. It was inevitable that such a technique should be used in criminal cases. A typical case (and one which bears heavily in this case) is *State v. Jones,* 44 N.M. 623, 107 P.2d 324 (1940). There Jones had been prosecuted several years before under a criminal lottery act. The Court had held that Jones' activity was not a lottery within the meaning of the statute and he was found not guilty.* Jones continued to engage in the same activity—sanctioned by the court's opinion—and was eventually prosecuted a second time under the same statutory provision. Although the trial court dismissed, on appeal the state supreme court changed its interpretation and overruled the decision in the first prosecution. But the court refused to apply the new rule to Jones. "The plainest principles of justice," it said, demand that the prior decision be overruled prospectively only.**

The social and legal need to give only prospective effect to the new decision in *Jones* was especially great, since, if anyone had a right to rely upon the first

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**Roswell v. Jones,* 41 N.M. 258, 67 P. 2d 286 (1937)

**Judge Zinn, dissenting, urged the traditional view— ". . . If what the majority says is the law, then it has been the law ever since the Legislature passed the lottery law."

decision, it was Jones himself.* However, the same result has followed in the more usual criminal cases in which different defendants were involved in the two decisions. As the Supreme Court of Mississippi said in *State v. Longino,* 109 Miss. 125, 133, 67 So. 902, 903 (1915), it "would be the very refinement of cruelty" to allow "punishment of an act declared by the highest court of the state to be innocent, because the same court had seen fit to reverse its interpretation of a statute".

An even more relevant example is the cases in which the reinterpretation of state taxation statutes to make taxable that which had previously been held to be nontaxable were given prospective effect only.**

So, *Arizona State Tax Commission v. Ensign,* 75 Ariz. 376, 257 P. 2d 392 (1953), when reinterpreting a state taxation statute to make taxable that which had previously been held nontaxable, the Court expressly held that such reinterpretation would be given only prospective effect, stating:

> "In fairness to the parties who relied upon the previous holding of this court—in the Pratt-Gilbert case—that transactions of the character here involved were nontaxable under the Excise Reve-

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*This, of course, is true here. If anyone had the right to rely upon the first *Monolith* case, and its having been held "distinguishable" as "not apposite" in *Cannelton,* it was Monolith, when confronted with the statutory election several months after *Cannelton.*

**e.g., *Arizona State Tax Commissioner v. Ensign,* 75 Ariz. 376, 257 P. 2d 392 (1953); *Harris v. Jex,* 55 N.Y. 421, 14 Am. Rep. 285; *Laabs v. Wisconsin Tax Comm.,* 218 Wis. 414, 261 N.W. 404, 405.

nue Act of 1935, as amended, we now hold that our decision in the instant case be given prospective effect only."*

Thus, the state courts have reached an accommodation with the strict Blackstonian doctrine of retroactivity. Where sensible men in shaping their conduct plainly acted in the light of a judicial interpretation of a statute, the later reversal or overruling of such interpretation is given only prospective application.

The technique of prospective overruling was thus not novel when the Supreme Court was first asked to pass upon its constitutionality in *Great No. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932).** A Montana statute giving the State Railroad Commission authority to fix intrastate transportation rates and to change rates shown to be unreasonable had been construed in *Doney v. Northern Pac. Ry.*, 60 Mont. 209, 199 Pac. 432 (1921) to create a right to reparation in both carriers and shippers if rate schedules were changed up or down. After the relevant rates were held excessive, Sunburst sued Great Northern to recover the excess. The Montana Supreme Court held that the *Doney* rule was erroneous, and disavowed it. However, because it

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*In *Duhame v. State Tax Commission*, 65 Ariz. 268, 179 P. 2d 252 (1947), cited in the *Ensign* case, the court said: "However in fairness to the materialmen who have relied upon our express holding in the Crane case that a sale to a contractor was a sale for resale and not taxable, we now hold that our decision in the instant case should be given prospective effect only. Unquestionably we have the right to so limit the application of this ruling."

**See Annotation, 85 A.L.R. 262 (1933) collecting cases of prospective overruling prior to *Sunburst*.

constituted "the governing principle for shippers and carriers who, during the period of its reign, had acted on the faith of it," the Court allowed Sunburst to recover but announced that *Doney* would not be followed in the future. Great Northern's petition for certiorari on the ground that such prospective overruling denied it due process was granted, but the Supreme Court affirmed on the theory that a state court might permissibly make a choice between the Blackstonian doctrine and the prospective overruling doctrine. Montana's choice being a permissible one, the judgment was affirmed. (287 U.S. 358, 364-365, 367)

As Justice Cardozo (the leading exponent of the prospective overruling technique) stated: (287 U.S. 358, 365-366)

> ". . . As applied to such transactions we may say of the earlier decision that it has not been overruled at all. It has been translated into a judgment of affirmance and recognized as law anew. Accompanying the recognition is a prophecy, which may or may not be realized in conduct, that transactions arising in the future will be governed by a different rule."

After the *Sunburst* case, the Supreme Court did not consider the possibility of prospective overruling for 30 years. Then, in *James v. United States,* 366 U.S. 213, concluding that *Commissioner v. Wilcox,* 327 U.S. 404 had been "thoroughly devitalized" and "effectively vitiated" by *Rutkin v. United States,* 343 U.S. 130, the Court overruled *Wilcox,* and held that embezzled funds

constituted taxable income. However, the Court decided to apply the new rule prospectively only, and so it reversed the conviction, stating: (366 U.S. 221)

> "We believe that Wilcox was wrongly decided and we find nothing in congressional history since then to persuade us that Congress intended to legislate the rule. Thus, we believe that we should now correct the error and the confusion resulting from it, certainly if we do so in a manner that will not prejudice those who might have relied on it. Cf. Helvering v. Hallock, supra (309 US at 119) . . ."*

Justice Harlan's opinion, concurring as to the overruling of *Wilcox*, but favoring a new trial of the issue of taxpayer's reliance on *Wilcox*, stated: (366 U.S. 242)

> "I share the view that it would be inequitable to sustain this conviction when by virtue of the Rutkin-Wilcox dilemma it might reasonably have been thought by one in petitioner's position that no tax was due in respect of embezzled moneys. For as is pointed out, Rutkin did not expressly overrule Wilcox, but instead merely confined it 'to

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*In *Helvering v. Hallock*, 309 U.S. 106, the Supreme Court, while not finding the doctrine applicable, referred to the possibility that in a proper case, only prospective application should be given to a new interpretation of the tax statute. The court said: (p. 119)

> "Nor have we in the St. Louis Union Trust Co. Cases rules of decision around which, by the accretion of time and the response of affairs, substantial interests have established themselves. . . . We have not before us interests created or maintained in reliance on those cases. . . ."

its facts.'* Having now concluded that Wilcox was wrongly decided originally, the problem in this case thus becomes one of how to overrule Wilcox 'in a manner that will not prejudice those who might have relied on it.' "**

Justice Black's opinion, which concurs with the reversal, but dissents from overruling *Wilcox,* points out that repeated efforts by the Administration to subject embezzled funds to taxation were defeated in Congress, and that the case is not, therefore, one in which Congress failed to change the law:

". . . because it did not know what was going on in the courts or because it was not asked to do so."

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*Compare the Court's language in *Cannelton,* holding "distinguishable" all prior decisions except those applying the "individual profitability rule" involved in *Cannelton.* (364 U.S. 76, 89)

**This judicial aversion to the retroactive imposition of a forfeiture by a change in the applicable rule was best expressed by Justice Jackson in *Helvering v. Griffiths,* 318 U.S. 371, when he said: (p. 402)

"We are asked to make a retroactive holding that for some seven years past a multitude of transactions have been taxable although there was no source of law from which the most cautious taxpayer could have learned of the liability. If he consulted the decisions of this Court, he learned that no such tax could be imposed; if he read the Delphic language of the Act in connection with existing decisions, it, too, assured him there was no intent to tax; if he followed the congressional proceedings and debates, his understanding of nontaxability would be confirmed; if he asked the tax collector himself, he was bound by the Regulations of the Treasury to advise that no such liability existed. It would be a pity if taxpayers could not rely on this concurrent assurance from all three branches of the Government. But we are asked to brush all this aside and simply to decree that these transactions are taxable anyway."

Here, like *Griffiths,* "There was no source of law" or practice specifying a crushed limestone depletion base prior to Monolith's 1960 election, and Monolith justly relied upon similar occasions many more times than Griffiths did (pp. 13-25, above).

And that when the Court changed by judicial decision a statutory interpretation which Congress knew of and left standing it:

> ". . . passed beyond the interpretation of the tax statute and proceeded substantially to amend it."*

However, although Justice Black disagrees with what he believes is the creation of a judicial crime, and thinks Congress alone should exercise such function, he agrees with the Court's refusal to apply the new crime retroactively, stating:

> ". . . Thus, although it was not the law yesterday, it will be the law tomorrow that funds embezzled hereafter are taxable income . . . We do not challenge the wisdom of those of our Brethern who refuse to make the Court's new tax evasion crime applicable to past conduct. This would be good governmental policy even though the ex post facto provision of the Constitution has not ordinarily been thought to apply to judicial legislation . . ."
>
> "We realize that there is a doctrine with wide support to the effect that under some circumstances courts should make their decisions as to what the law is apply only prospectively. [citing *Sunburst*] . . ."

Even Justice Clark, who voted to overrule *Wilcox* and apply the new rule to *James* and affirm, recognized

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*In the present case, of course, Congress not only resisted the efforts of the Administration to "revise the law" *(ante,* pp. 18-19), but "overruled" the Supreme Court's decision in *Cannelton* and reaffirmed a finished product depletion base for the clay industry. Therefore, the decision in *Monolith* extending *Cannelton* clay case rule to cement producers was a substantial amendment of existing law.

the possibility of justifiable reliance upon *Wilcox* which would bar conviction, but concluded that petitioner "placed no bona fide reliance on *Wilcox*" (366 U.S. 241).

The assumption that *Sunburst* applied to federal courts and sanctioned their authority to speak prospectively had been made prior to *James* by individual Justices. In *Griffin v. Illinois,* 351 U.S. 12 (1956), Justice Frankfurter urged that the Court should have specifically limited its ruling to prospective application because:

> ". . . candor compels acknowledgment that the decision rendered today is a new ruling . . ."
>
> ". . . The judicial choice is not limited to a new ruling necessarily retrospective . . . For sound reasons law generally speaks prospectively . . ."
>
> "We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights. It is much more conductive to law's self-respect to recognize candidly the considerations that give prospective content to a new prouncement of law . . . Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 363-366 . . ." (351 U.S. 12, 25-26)

In some cases, the retroactive application of a judicial decision may even be unconstitutional. For example, in *Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 U.S. 673 (1930), the decision of the Missouri Supreme Court* overruling the *Laclede*** case was held

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*323 Mo. 180, 19 S. W. 2d 746

***Laclede Land & Imp. Co. v. State Tax Comm'n.,* 295 Mo. 298 (1922)

to be a denial of due process if such new rule were to be applied retroactively, when, because of the running of the statute of limitations and its reliance upon the *Laclede* case, such change of law precluded the taxpayer from being heard on its claim* in accordance with the newly approved procedure.

In this case, the retroactive application of the new *Monolith* rule to Monolith's closed, pre-1961 tax years, declaring that taxpayers' depletion base was to be crushed limestone, where before it had been cement, is comparable to *Brinkerhoff*.

Congress could permissibly offer cement producers a choice as to pre-1961 tax years—as it did in the 1960 legislation. Such a statute, however, together with the Regulations, operated as a statute of limitations. Unless a cement producer elected a kiln-feed cut-off in 1960, its depletion base was to be determined "in accordance with existing law." But if the law as it existed in 1960 were to be subject to later retroactive change by judicial decision, such proffered election truly would be but a snare and a delusion, and the remedy Congress had provided would be an empty one.

Turning to the lower federal courts, we find that the doctrine of prospective overruling is well-recognized and applied in appropriate cases.** Perhaps the best

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*An action to restrain the collection of township taxes alleged based upon a discriminatory assessment.

**For a thoroughgoing discussion of this subject and citation of many of the articles and cases dealing therewith, see *Warring v. Colpoys*, 122 F. 2d 642, C.A.D.C. 1941, cer. den. 314 U.S. 678 (1941).

expression of the doctrine is found in the recent case of *Safarik v. Udall,* 304 F. 2d 944, C.A.D.C. 1962, where the Court, citing *Sunburst,* stated: (pp. 949-950)

> ". . . courts ordinarily will give prospective effect only to a decision overruling prior decisions where persons have contracted, acquired rights, or acted in reliance on the prior decision, and the operation of the later decision retrospectively would result in substantial harm to such persons"

Although the courts have not always articulated the reasons which impelled them to prospective overruling, certain criteria have been developed in this regard.

The first considered has been the purpose of the newly announced rule,* i.e., what is the social value of making the new rule retroactive? For example, in the legislative divorce cases, the purpose of the new rule was to halt an unauthorized practice—not to penalize innocent parties who would have suffered had the new rule been made retroactive.** The courts found social value in not applying the new rule retroactively. So, too, in the tax cases, where something previously held to be nontaxable was declared taxable long after the operative facts oc-

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*Of course, the Supreme Court itself has recognized the distinction between the retroactivity involved in the pronouncement of a new rule which overrules a prior rule, and a case of first impression. However, even in the latter case—where there has been no old rule and hence no reliance—the Court has said that ". . . such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *Securities & Exchange Commission v. Chenery Corporation,* 332 U.S. 194.

**_Bingham v. Miller,_ 17 Ohio 445 (1848), cited by Justice Frankfurter in *Griffin,* 351 U. S. 12, 26 (1956).

curred, the purpose of the new rule has been to get the law "back on the rails," and social value has been recognized in not destroying the commercial transactions made in reliance upon the old rule.*

The next consideration is the element of surprise, i.e. the degree and quality of the penalizing which would result from the change in the rule of law. Sometimes the old rule will be a rule which has been consistently and unanimously adhered to and reaffirmed. Manifestly, when parties had based their conduct on the old rule, retroactive application of the new rule would defeat their reasonable expectations and result in surprise. In other cases, the "new" rule may merely be a clarification which reconciles (and possibly overrules) overlapping and partially inconsistent lines of cases. In such a case, the existence of such a state of the precedents may not provide the basis for reasonable reliance. So, too, it will not do for a litigant to place reliance upon the old precedent, when it is ancient and has long since been diluted or eroded to a shadow,** or where the area of activity has changed dramatically since the old rule.***

The final factor which has been given weight is the recognition that many judicial decisions, if given retroactive force, could be applied only on an uneven basis,

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*See, e.g., *Duhame v. State Tax Comm.*, 65 Ariz, 268, 179 P. 2d 252, 259 (1959)

**But see *James v. United States*, 366 U.S. 213 (*supra*, p. 54), refusing to apply the new rule retroactively, even though *Wilcox* had been "thoroughly devitalized" by *Rutkin*.

***Compare *Federal Baseball Club v. National League*, 259 U.S. 200 (1922), and *Toolson v. New York Yankees*, 346 U.S. 356 (1953) with *United States v. International Boxing Club*, 348 U.S. 236 (1955)

thus resulting both in unfairness and diminished respect for the judicial system.

In summary, it may fairly be said that the American courts, including the United States Supreme Court, have recognized that under appropriate circumstances (where litigants have reasonably relied upon the old rule in shaping their conduct) the pronouncement of a new interpretation of a statute which affects primary rights, should be applied prospectively only, and not retroactively. Such doctrine is essentially grounded on the premise that to do so is required by the fundamental notions of fairness that lie at the roots of our system of law.

C. The Policy Against Retroactive Tax Legislation.

Although the Supreme Court has held that Congress may (when its purpose so to do is clearly expressed) make new income tax acts "retroactive for relatively short periods so as to include profits from transactions consummated while the statute was in process of enactment, or within so much of the calendar year as preceded the enactment" *(United States v. Hudson,* 299 U.S. 498 (1937)—35 days), retroactive tax legislation is generally regarded as unjust and unsound in principle.

Perhaps the best judicial statement of this principle is contained in *Shwab v. Doyle,* 258 U.S. 529 (1922), where the Court struck down a retroactive gift tax, stating: (p. 534)

> "There is absolute prohibition against them [retroactive laws] when their purpose is punitive; they then being denominated ex post facto laws. It is the sense of the situation that that which impels prohibition in such cases exacts clearness of dec-

laration when burdens are imposed upon completed and remote transactions, or consequences given to them of which there could have been no foresight or contemplation when they were designed and consummated."

Congress has agreed with this principle. For example in 1917, the Senate Finance Committee rejected a House proposal to levy additional income tax, stating:*

"This [retroactive] tax seemed to the committee to be in principle both morally and economically unsound and to deserve exclusion as retroactive legislation . . . Moreover, it is to be remembered that if we admit the principle of retroactive taxation running back six months we also assert the right to carry it back for one year or ten years, or for any length of time. To do this would hold out a threat of uncertainty in tax conditions, and almost the greatest foe of business productivity and prosperity is uncertainty. For these reasons the committee had no doubt as to the wisdom of striking from the bill the retroactive tax on income . . ."

So, too, the question of retroactivity was prominent in connection with the 1950 revision of the formula for taxation of life insurance companies. The Senate Report** stated:

"Your committee does not believe it advisable to apply the formula retroactively to the years 1947 and 1948. The returns for those years were

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*S. Rep. No. 103, 65th Cong., August 4, 1917

**S. Rep. No. 2375, 81st Cong., p. 39, August 22, 1950.

filed some time ago; the books of the companies have been closed; and in some cases no reserves were established to cover the Federal tax liability . . . some companies had made commitments in those years relying on the fact that no Federal income tax was payable under existing law. Hence, the payment of a tax now could impose a hardship upon the policyholders."

* * * * *

"The committee believes that the constitutionality of a tax imposed at this time [1950] on 1947 and 1948 incomes is at least debatable . . .

"Even if your committee were of the opinion that a tax levied now on 1947 and 1948 incomes would be upheld by the Supreme Court, it would still oppose retroactive taxation extending over such a long period of time. The imposition of a tax on 1947 and 1948 incomes at this late date would be inconsistent with fundamental public policy which requires that a taxpayer's obligation to his Government be made definite and certain at the time the tax is due."*

Of course, there are a variety of situations where retroactivity has been deemed permissible, such as the retroactive relief measures.** The attitude is that while it is improper to increase taxes retroactively, it is proper to grant relief retroactively.

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*In the present Monolith cases, the gap between the proposed new retroactive rule and the tax years is not 2-3 years, as in the life insurance provisions discussed above, but 10 years.

**e.g., when Congress "overrules" the Supreme Court, as in §§ 8, 9, P. L. 378, 81st Congress, designed to overcome *Commissioner v. Church,* 335 U.S. 632 (1949), and *Estate of Spiegel v. Commissioner,* 335 U.S. 701 (1949)

President Kennedy summed up the rule against retroactivity as follows:

> "There is a basic policy against retroactive amendments to the tax laws."*

D. The Need for Non-Retroactivity in These Cases.

As we have seen, the effect of a new judicial interpretation of a statute is, in a very real sense, the same as an amendment of the law by means of a legislative enactment.**

If such new judicial interpretation or construction frustrates commercial transactions which have been made in reasonable reliance and faith upon the old law as announced in prior opinions, the policy of the law requires that such change in settled law should be given only prospective application.***

As the Supreme Court itself pointed out in an analogous case—*United States v. Alabama Great Southern R. Co.,* 142 U.S. 615 (1892): (p. 621)

> ". . . It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of

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*Statement Accompanying H. R. 7057 (P. L. 87-312)

***Douglass v. County of Pike,* 101 U.S. 677 (1879); and pp. .... *supra.*

***As Professor Davis puts it:

> ". . . The common law tradition to the contrary notwithstanding, a retroactive change of settled law by judicial decision is just as fair or unfair as retroactive change of settled law *in similar circumstances* by administrative or legislative action. Therefore changes in settled law, whether by judicial decision or otherwise, frequently should be limited to prospective operation . . ."

1 *Davis* Administrative Law Treatise, § 5.09, pp. 351-352.

> such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the government. . . ."

We submit that the Monolith and Midwest depletion cases present just such a situation.

As is so clearly demonstrated by Points 1-18 of the chronology of events set out at pages 13-25 above, the present cases present an aggravated case of the frustration of justifiable reliance upon settled law, as this Court recognized in its prior *Monolith* opinion (301 F. 2d 488, 497).*

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*As heretofore noted the Monolith Companies relied upon the following and other acts and events in conducting their business and arranging their property rights in the period 1953-1963 —(1) The Treasury's publication, in 1953, of Revenue Ruling 290, 1953-2 C.B. 41 (in effect 1953-1961) that "calcium carbonates . . . mined for use in the cement industry, are not customarily sold in the form of a crude mineral product"; (2) commencing with *Cherokee Brick & Tile Co. v. United States,* 218 F. 2d 424 (5 Cir., 1955), the unanimity of all the courts of appeal construing the statutory word "mining" to include the additional necessary processing to obtain a salable mineral product when the mineral was not marketable in crude form, and the application of such rule to the calcium carbonates used in the cement industry, *United States v. Dragon Cement Company,* 244 F. 2d 513 (1 Cir., 1957); (3) the denial by the

All the courts of appeal had held in similar type-situation cases that the statutory word "mining" included all the processes required to obtain a mineral

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Supreme Court of the Government's petitions for certiorari to review 14 cases involving such rule in 1957 (including one cement case—*Dragon);* (4) four days following the denial of certiorari in such cement and clay cases, the Treasury's issuance of Technical Information Release No. 62, announcing that "in view of" such denial of certiorari the Internal Revenue Service was "taking steps to dispose of pending litigation and claims involving brick and tile clay and cement rock, as required under these decisions"; (5) the first *Monolith* case, in 1958, where it was found as a fact that Monolith's "calcium carbonates" were not marketable unless processed into cement, *Monolith Portland Cement Company v. United States,* 168 F. Supp. 692, S.D. Cal. 1958, and such finding was accepted by the Government on the appeal and approved by the court in allowing a finished cement cut-off, 269 F. 2d 629, 632-633 (9 Cir., 1959); (6) The Government's acceptance of that decision by not petitioning for certiorari; (7) The Treasury's concession early in this litigation that cement producers were entitled to at least a kiln feed cut-off depletion (not crushed limestone) upon calcium carbonate minerals. (First *Monolith* case—R. 21); (8) As noted by the House of Representatives (House Report No. 939, 87th Cong., 1st Sess.), the Government's assumption that the principles of *Merry Brothers* and *Dragon* were the "existing law" by recommendations in two budget messages to Congress and by communications to Congress in 1958 and 1959 "on the need to revise the law" for the brick and cement industries; (9) The Treasury's letter report to the Senate Finance Committee: (Sen. Rep. No. 903, p. 17) "Producers of all these other minerals thought they were entitled to rely on the principles of the *Merry Brothers* case and they did so rely in filing their returns.' "; (10) The subsequent settlement by the Treasury of some "calcium carbonates"—cement cases on a finished cement cut-off, including one case involving Monolith's principal competitor *(Riverside Cement Co. v. United States,* 2 AFTR 2d 6175, S.D.Cal. 1959); (11) The unanimity of all the lower courts in approving a finished cement cut-off in "calcium carbonates"—cement cases, 1957-1962; (12) The Government's 1959 admissions in this case that "We know of no 'limestone industry' nor any designation by it for rock of the type mined by the plaintiff." [R. 96], and that the mineral, processes and markets were the same in this case as in the first *Monolith* case [R. 66, 79, 91-92]; (13) The Supreme Court's express exclusion of the 54 unanimous lower court decisions (including the calcium carbonates—cement cases), as "inapposite" and "distinguishable" from *Cannelton,* 364 U.S. 76, 89 (1960).

product which could actually be sold. Two courts had even held in factually identical cases—*Dragon* and *Monolith*—that cement-type limestone ("calcium carbonates") was non-marketable and that the cement kiln sintering processes were part of the statutory "mining." The Government's petition for certiorari was denied in *Dragon;* no certiorari was even sought in *Monolith.* The Supreme Court in *Cannelton*, while disclaiming express approval of such prior cases, explicitly held them to be inapposite and "distinguishable" from *Cannelton,* since they did not involve "the profitability test, which we find unacceptable," (364 U.S. 76, 89), and thus, for all practical purposes, set the seal of approval upon the statutory construction unanimously adopted by the courts of appeal.

Three months after *Cannelton* Congress provided that cement taxpayers could buy their peace at a kiln-feed depletion base, or have their base fixed "in accordance with existing law." A taxpayer's election—involving all open years prior to 1961—had to be made promptly, by November 15, 1960 and was irrevocable.*

Faced with the deficiency assessments the Treasury had levied to offset a finished cement depletion allowance,** the Monolith companies had no real choice, and elected to have their depletion bases determined "in accordance with existing law"—*Monolith* and *Dragon*—the law the Supreme Court had left undisturbed, based

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*Treasury Regulations Sections 1.9003-1.9003-5, 25 F.R. 8904, September 16, 1960.

**Following taxpayer's victory in the first *Monolith* case, the Treasury audited all of Monolith's and Midwest's open years, and by examination of depreciation bases, expense allowances, etc., assessed huge deficiencies, which offset the depletion allowances. Such systematic persecution has not stopped with the corporations—but has also been extended to the taxpayers' supervisory and executive employees.

upon the factual identities of the cases, the Treasury's admissions that the deposits were "calcium carbonates", that "calcium carbonates" were not "customarily sold in crude form," that there was no "limestone industry," and many other pertinent facts related herein.

This Court agreed that such reliance was well-founded. (301 F. 2d 488, 497). So, too, reasoned the district court in the *Midwest* case, decided in September, 1962 [Findings of Fact 23, 26; Clk. Tr. 1300-1302].

After such election became final and irrevocable, the Supreme Court granted certiorari in *Monolith* and summarily reversed on the authority of *Cannelton.*

Thus, the rule the Supreme Court announced in *Monolith*—that it was "controlled" by *Cannelton* (371 U.S. 537, 9 L.ed. 492)—was just what the Supreme Court had explicitly declined to do in *Cannelton,* and marked the extension, for the first time, of the *Cannelton* rule to cases where the critical element was not "profitability," but lack of an actual market. In every sense of the word, this was a "new" rule—a new interpretation of Section 114(b)(4)(B).

The financial effect of such decision, if applied retroactively to all the open pre-1961 tax years of the Monolith companies, will be nothing short of astronomic and catastrophic. Having shaped their conduct for years in reliance upon what they reasonably believed to be settled law, such companies were ill-equipped to produce the 3-4 million dollars in ready cash to meet the exaction the Treasury now demands.*

We respectfully submit that the present cases are classical examples of how the unreasoned extension of a

*A list of the outstanding assessments, deficiencies and proposed deficiencies determined by the Internal Revenue Service to date is printed in the Appendix, pp. 29-30.

legal fiction may work the very injustice it was designed to correct, and that such cases truly merit the judicial relief of prospective application of the new rule only.

All informed students of our complex system of taxation are agreed that in a society which depends upon voluntary appraisement, as ours does, the prime requisites are that of reasonable certainty, predictability and reliability. *Dobson v. Commissioner of Internal Revenue,* 320 U.S. 489, 499-500 (1944).

As Mr. Justice Frankfurter has pointed out, since it is impossible "for one not a specialist in this field to examine every question which comes before the Court independently" it was his practice "in construing a tax law . . . to follow almost blindly accepted understanding of the meaning of tax legislation, when that is manifested by long-continued uniform practice . . ." *Flora v. United States,* 362 U.S. 145, 4 L.ed.2d 623 (1960)

This *is* a changing world, and no one doubts the constant need for constant change in tax statutes to meet changing needs in our complex society. In many cases, prognostication is useless and a statute must be tried out, and adjusted, and adjusted again, like a fine watch or automobile, before the desired results are obtained. But to the man who pays his taxes—his share of civilization—such abstractions are meaningless. He must *know* what he can and cannot do with reasonable certainty. Therefore, when an effort is made to change an existing statutory interpretation retroactively, it not only destroys transactions entered into in faith upon the law which applied when they were entered into; but it also violates fundamental American concepts of justice and fairness and shakes the confidence of taxpayer-citizens in the reliability of our tax system.

IV.

The "Existing Law" Congress Specified Should Be Applied in Determining the Depletion Base of Cement Producers Who Did Not Buy Their Peace at Kiln-Feed Was the Law at the Time the Irrevocable Election Had to Be Made—Dragon and the First Monolith Case.

As noted earlier, Congress amended the 1960 cement legislation (which fixed cement producers' depletion base at kiln-feed for 1961 and later years), adding the provision that such a base might be elected for all pre-1961 years as well (Section 4 of the Act of September 14, 1960, P.L. 86-781, 74 Stat. 1017).

This Court discussed such amendment—its meaning and scope—in its prior opinion. 301 F.2d 488, 495-496, and concluded that: (p. 496)

> "As we have attempted to show above, Cannelton does not apply to the fact issues presented in the instant case. Indeed, the Court there expressly stated that it was not disturbing prior law which, in part, related to the cement industry. This was done in plain language. Surely Congress considered such plain language. And it follows than that 'existing law' for the cement industry (i.e., for taxpayers operating within the same factual circumstances as taxpayer herein) must be deemed to be the Dragon Cement and first Monolith cases."

This issue (what was "existing law" when cement taxpayers made their election in 1960) was not presented to, discussed by or decided by the Supreme Court in *Monolith*. Indeed, it is plain from the opinion itself that the question was not considered. The Supreme Court in *Monolith* did not even mention the prior decisions it had

held "distinguishable" in *Cannelton,* and noted that "There is no question involved here under the Act of September 14, 1960," although Monolith's Reply Brief raised such question.

It is conceded that having elected not to accept a kiln-feed cut-off, the depletion base for these two taxpayers is to be determined in accordance with "existing law".

The question is—*what was* "existing law" when they made their election late in 1960? For if the phrase connotes no more than the future shifting nuances of judicial construction, it is meaningless.

We respectfully submit that this Court's determination that "existing law" in 1960 was *Dragon* and the first *Monolith* case was correct, and should be adhered to as the "law of the case", since the Supreme Court did not consider or decide this question.

V.

Rights, Questions or Facts Put in Issue and Determined in a Prior Suit Are Conclusively Established for the Purpose of Any Subsequent Suit.

The Supreme Court announced the "classic statement" of the rule of res judicata* over 60 years ago in *Southern Pacific R. Co. v. United States,* 168 U.S. 1 (1897) when it said:

> "The general principle announced in numerous cases is that a right, question or fact distinctly

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*"We start then with a case which falls squarely within the classic statement of the rule of res judicata in Southern Pacific R. Co. v. United States, 168 U.S. 1, 48, 49, 42 L.ed. 355, 376, 377, 18 S. Ct. 18." *United States v. Munsingwear, Inc.,* 340 U.S. 36 (1950).

> put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

This rule, of course, applies in tax cases. *Tait v. Western Maryland R. Co.* 289 U.S. 620 (1933).

In applying the rule of *res judicata,* a distinction must be made between the cases where *the judgment* in a prior case is argued to be a complete bar to a later, different cause of action and those cases where the determination of a *right, question, or fact* in the prior case is urged as a bar to the relitigation of the same right, question or fact in a subsequent, different case.

As the Supreme Court points out in *Commissioner v. Sunnen,* 333 U.S. 591, a judgment "puts an end to the cause of action which cannot again be brought into litigation . . . upon any ground whatever," while if the second, later suit is for a different cause of action the doctrine is restricted to points actually decided, i.e., ". . . Matters which were actually litigated and determined in the first proceeding cannot later be relitigated." Applying these principles to tax litigation involving different tax years, "The prior judgment acts as a collateral estoppel only as to those matters in the second proceeding which were actually presented and determined in the first suit." (333 U.S. 591, 598).

The Supreme Court then pointed out the dangers in applying the *judgment* in the first tax case "blindly"

as a collateral estoppel in a second tax year (333 U.S. 591, 599), but distinguished the application of the judgment as an estoppel from the case where a particular "fact", litigated in the first case, is relied upon, rather than the judgment per se: (333 U.S. 591, 601):

> "Of course, where a question of fact essential to the judgment is actually litigated and determined in the first tax proceeding, the parties are bound by that determination in a subsequent proceeding even though the cause of action is different."

This distinction is crucial!

In this case, Monolith does not rely upon the judgment in the first *Monolith* case as a bar. Indeed, such reliance would be misplaced, under *Sunnen*. What Monolith does rely upon is the determination of questions of fact which are, in the Supreme Court's words, "essential to the judgment."* These questions—Monolith's statutory class of mineral, the "market" for Monolith's mineral, and what processes are necessarily applied to obtain a "commercially marketable product"—were essential to the first judgment and are essential to any judgment in this case. Based upon the proof and the Government's admissions of the identity of the facts of the two cases as to the mineral, the market and the processes, Monolith contends that the determination of any

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*This distinction—between collateral estoppel by judgment, and applying prior determinations of fact as a bar to their relitigation—is still the law. As pointed out in *Yates v. United States,* 354 U.S. 298, 335, 336: "There remains to be dealt with petitioner Schneiderman's claim based on the doctrine of collateral estoppel by judgment . . . that doctrine makes conclusive in subsequent proceedings only determinations of fact, and mixed fact and law, that were essential to the decision. *Commissioner v. Sunnen,* 333 U.S. 591, 601, 602 . . ."

or all of such questions differently than their determination in the first *Monolith* case violates the rule of *res judicata.*

Since the Supreme Court expressly relied upon its findings that Monolith's "crushed limestone" was actually "marketable in that form" in reaching its opinion, it is plain that on different findings of fact as to the question of the identity of the mineral involved and the available market therefor (as required by the doctrine of *res judicata*), the Court would have reached a different result. However, what the Supreme Court *would have done* had the question of *res judicata* been presented to it is purely hypothetical. The fact is, the question was *not* presented. Indeed, the Government even went so far in its Petition in an effort to narrow the question presented to the Court to one of law justifying certiorari as to say that the questions of the statutory identity of Monolith's mineral and collateral estoppel were no longer "in the case".*

Having prevailed in its Petition for Certiorari, the Government has made a sharp about-face and now urges that the Supreme Court's opinion forecloses, not only the narrow question of law actually presented, but also the additional questions of fact the Government assured the Supreme Court were no longer in the case. It just won't wash.

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*As the Government's Petition for Certiorari asserted (p. 3) [Appendix, p. 14]:

"There have been two other issues in the case. The 'marble' issue raised by the Government in the trial court as an additional defense, is not raised in this petition. A collateral estoppel issue was raised by the taxpayer in relation to both of the other issues, but both courts below preferred to rest their decisions on the merits. (R. 169-170; App. A, *infra,* p. 39) In view of this Court's subsequent decision in *Cannelton,* collateral estoppel clearly does not apply to the issue presented on this petition. See *Commissioner v. Sunnen,* 333 U.S. 591."

If, as the Supreme Court believed, it merely passed on a question of statutory construction, without disturbing other dominant legal points in the record, the District Court's original Findings of Fact [R. 168-185] should have remained unchanged. There was no need to amend such findings as to the identity of the mineral, the market therefor, and the processes involved to obtain a marketable product, as they still applied to the principles of law of the case, existing law, nonretroactivity and *res judicata*. The District Court actually did not disturb these findings, but it merely ignored them in adopting the language used by the Supreme Court which it quoted as requiring it to find that the vague, generic, non-statutory term "crushed limestone" applied as the cut-off point to Monolith's "calcium carbonates."

The District Court's drastic change in the findings highlights the thrust of Monolith's *res judicata* argument. Under the cloak of presenting a question of law worthy of certiorari, the Government obtained a summary reversal which it then proceeded to use to persuade the district court to ignore the facts already found by it and this Court to fit the Supreme Court's assumption of what those facts really were.

This is just the situation that the doctrine of *res judicata* prohibits! Monolith respectfully submits that after admissions and proof of identity of the evidentiary facts, it was and is improper to so allow the Government to relitigate such questions of fact and to obtain find-

ings thereon completely at variance with the determination of such factual questions in the first *Monolith* case.

We quote again from *Sunnen* the principle dispositive of this issue:

> "Of course, where a question of fact essential to the judgment is actually litigated and determined in the first tax proceeding, the parties are bound by that determination in a subsequent proceeding."

On the authority of *Sunnen,* the parties in this second *Monolith* case were "bound by that determination" in the first *Monolith* case, as to the statutory identity of the mineral deposit, the non-marketability thereof, and the processes required to obtain a "commercially marketble mineral product" therefrom.

It was error for the District Court to hold otherwise!

However, even if our confidence in the continued vitality of *res judicata* were misplaced (which we deny), the answer should still be the same—on the broader grounds of sound judicial administration and public policy.

As the Supreme Court points out in *Sunnen,* the reason for the cautious application of a prior judgment as a bar in a later tax case is to avoid "inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion" (333 U.S. 591, 599). These considerations are not present in this case.

As the Government advised the Supreme Court (Petition, fn. 11, p. 16), all but 6 (including the Monolith companies) of the almost 200 cement producers elected a kiln-feed cut-off as to pre-1961 tax years. And, by

statute, *all* cement producers have a kiln-feed cut-off for 1961 and later years. Thus, the determination of a "crushed limestone" depletion base—and not the contrary—will create the inequalities, discrimination and litigation envisaged by *Sunnen*. Thus, the reason for the rule in *Sunnen* does not apply here.

Second, and more importantly, the Supreme Court in *Sunnen,* explicitly recognized that a strong dose of judicial common-sense was required in this area. When discussing the weight to be accorded *the judgment* in a prior tax case, the Court pointed out that a change in the facts or law: (333 U.S. 591, 599)

> ". . . may make that determination obsolete or erroneous, *at least for future purposes* . . ." (Italics added)

and that: (333 U.S. 591, 599)

> ". . . collateral estoppel [by judgment] must be used with its limitations clearly in mind *so as to avoid injustice.*" (Italics added)

Finally, in summing up, the Court says that where a Court is not bound by *res judicata* or collateral estoppel by judgment because of a change in facts: (333 U.S. 591, 601)

> ". . . In that situation, a court is free in the second proceeding to make an independent examination of the legal matters at issue. It may then reach a different result *or, if consistency in decision is considered just and desirable,* reliance may be placed on the ordinary rule of stare decisis . . ."

We respectfully submit that the Supreme Court recognized in *Sunnen* that even when the prior *judgment* was urged as a bar but the facts or law had changed, situa-

tions could arise where freedom from *res judicata* and collateral estoppel by judgment would be unjust and inequitable, and that in such cases, to accomplish substantial justice, the courts could properly apply stare decisis to reach the same result as the prior case, or in any event, apply the new legal rule propectively only, and not retroactively.

We believe that, as we have shown, Monolith's *res judicata* question is not an attempt to use the *judgment* in the first *Monolith* case as a bar, but instead is the application of the principle of forbidding relitigation of *questions of fact* which are essential to both judgments, approved by *all* the decisions, including *Sunnen*. Further, we have shown that, even if such question be viewed as an effort to use the prior judgment as a bar, the present case falls within the class of cases calling for only prospective application of the new legal rule, so as to avoid injustice.

VI.
Conclusion.

Because of the demonstrated application to this record of the legal principles of law of the case, existing law, non-retroactivity and res judicata, the judgment of the district court in *Midwest* should be affirmed; the judgment in Monolith should be reversed.

Dated: February 6, 1964.

Respectfully submitted,

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Attorneys for Monolith Portland Midwest Company and Monolith Portland Cement Company.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NORMAN ELLIOTT,
Attorney.

APPENDIX.

A. The Statute.

1. Internal Revenue Code of 1939 (Effective During 1952).

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(m) *Depletion.*—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. * * *

For percentage depletion allowable under this subsection, see section 114(b), (3) and (4).

(n) *Basis for Depreciation and Depletion.*—The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114.

* * * * *

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

* * * * *

(b) *Basis for Depletion.*—

(1) *General rule.*—The basis upon which depletion is to be allowed in respect of any property shall be the adjusted basis provided in section 113(b) for the purpose of determining the gain upon the sale or other dis-

position of such property, except as provided in paragraphs (2), (3), and (4) of this subsection.

* * * * *

(4) [as amended by Sec. 145(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 319(a) of the Revenue Act of 1951, c. 521, 65 Stat. 452] *Percentage depletion for coal and metal mines and for certain other mines and natural mineral deposits.*—

(A) *In General*—The allowance for depletion under section 23(m) in the case of the following mines and other natural deposits shall be—

(i) in the case of sand, gravel, slate, stone (including pumice and scoria) brick and tile clay, shale, oyster shell, clam shell, granite, marble, sodium chloride, and, if from brine wells, calcium chloride, magnesium chloride, and bromine, 5 per centum,

(ii) in the case of coal, asbestos, brucite, dolomite, magnesite, perlite, wollastonite, calcium carbonates, and magnesium carbonates, 10 per centum,

(iii) in the case of metal mines, aplite, bauxite, fluorspar, flake graphite, vermiculite, beryl, garnet, feldspar, mica, talc (including pyrophyllite), lepidolite, spodumene, barite, ball clay, sagger clay, china clay, phosphate rock, rock asphalt, trona, bentonite, gilsonite, thenardite, borax, fuller's earth, tripoli, refractory and fire clay, quartzite, diatomaceous earth, metallurgical grade limestone, chemical grade limestone, and potash, 15 per centum, and

(iv) in the case of sulfur, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or in-

curred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance under section 23(m) be less than it would be if computed without reference to this paragraph.

(B) [As added by Sec. 124(c) of the Revenue Act of 1943, c. 63, 58 Stat. 21, and amended by Sec. 304(d) of the Excess Profits Tax Act of 1950, c. 1199, 64 Stat. 1137 and Sec. 207(a) of the Revenue Act of 1950, c. 994, 64 Stat. 906] *Definition of Gross Income From Property.*—As used in this paragraph the term "gross income from the property" means the gross income from mining. The term "mining" as used herein shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products, and so much of the transportation of ores or minerals (whether or not by common carrier) from the point of extraction from the ground to the plants or mills in which the ordinary treatment processes are applied thereto as is not in excess of 50 miles unless the Secretary finds that the physical and other requirements are such that the ore or mineral must be transported a greater distance to such plants or mills. The term "ordinary treatment processes," as used herein, shall include the following: (i) in the case of coal—cleaning, breaking, sizing, and loading for shipment; (ii) in the case of sulphur—pumping to vats, cooling, breaking, and loading for shipment; (iii) in the case of iron ore, bauxite, ball and sagger clay, rock asphalt, and minerals

which are customarily sold in the form of a crude mineral product—sorting, concentrating, and sintering to bring to shipping grade and form, and loading for shipment; and (iv) in the case of lead, zinc, copper, gold, silver, or fluorspar ores, potash, and ores which are not customarily sold in the form of the crude mineral product—crushing, grinding, and beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic), cyanidation, leaching, crystallization, precipitation (but not including as an ordinary treatment process electrolytic deposition, roasting, thermal or electric smelting, or refining), or by substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the ore, including the furnacing of quicksilver ores. The principles of this subparagraph shall also be applicable in determining gross income attributable to mining for the purposes of sections 450 and 453.

* * * * *

B. Revenue Ruling 290, 1953-2 C. B. 41.

(Revoked Rev. Rul. 61-67, 1961-5 I.R.B. 10)

Advice is requested concerning the position of the Internal Revenue Service on the determination of the processes properly included in mining with respect to calcium carbonates and shale mined for use in the manufacture of cement.

It is the position of the Internal Revenue Service that calcium carbonates and shale, mined for use in the cement industry, are not customarily sold in the form of the crude mineral product, and that, therefore, under section 39.23(m)(1)(f) of Regulations 118, crushing and grinding are considered "ordinary treat-

ment processes" in the computation of gross income from the property for percentage depletion purposes. Blending with other material after crushing and grinding, such as that occurring at the kiln feed bins, is excluded from "ordinary treatment processes," but where mixing of the calcium carbonates and shale occurs before or during crushing and grinding, it will be considered as incidental to such processes.

The gross income for percentage depletion purposes must of course be computed separately with respect to each component mineral, notwithstanding any such mixing. The net income for purposes of the limitation on percentage depletion should also be computed separately for each component mineral unless the minerals are produced from the same "property." See Revenue Ruling 76, C.B. 1953-1, 176.

In view of the specific detailed listing in section 114(b)(4)(A) of the Internal Revenue Code, percentage depletion is not allowable on clay used in the manufacture of cement unless the clay so used definitely comes within one of the specific classifications in that section.

C. Pre-May 15, 1958 Depletion Decisions.

1. *Cherokee Brick & Tile Co. v. United States,* 122 F. Supp. 59 (M.D. Ga., 1954), affirmed 218 F. 2d 424 (C.A. 5, 1955);

2. *Haviland Clay Works Co. v. United States,* 169 F.Supp. 61 (N.D. Ohio, 1955);

3. *Townsend v. The Hitchcock Corp.,* 232 F.2d 444 (C.A. 4, 1956);

4. *Ferris Brick Co. v. United States,* 51 A.F.T.R. 1116 (N.D. Tex., 1956);

5. *United States v. Sapulpa Brick and Tile Corp.,* 239 F.2d 694 (C.A. 10, 1956);

6. *United States v. Merry Brothers Brick and Tile Co.,* 242 F.2d 708 (C.A. 5, 1957), certiorari denied, 355 U.S. 824 (1957);

7. *Dragon Cement Co. v. United States,* 244 F.2d 513 (C.A. 1, 1957), certiorari denied, 355 U.S. 833 (1957);

8. *Harvey v. United States,* 52 A.F.T.R. 1448 (D. Ariz., 1957);

9. *Louisville Brick Co. v. United States,* 1 A.F.T.R. 2d 563 (N.D. Miss., 1957);

10. *Riverton Lime & Stone Co. v. Commissioner,* 28 T.C. 446 (1957);

11. *Elgin Standard Brick Mfg. Co. v. United States,* 153 F.Supp. 279 (W.D. Tex., 1957);

12. *Strickland v. United States,* 153 F.Supp. 125 (E.D. No. Car., 1957);

13. *The Lovell Clay Products Co. v. United States,* 167 F.Supp. 891 (D. Wyo., 1957);

14. *Acme Brick Co. v. United States,* 160 F.Supp. 604 (N.D. Tex., 1957);

15. *Fraser Brick & Tile Co. v. United States,* 52 A.F.T.R. 1391 (W.D. Tex., 1957);

16. *Big Run Coal & Clay Co. v. United States,* 1 A.F.T.R. 2d 647 (W.D. Ky., 1957);

17. *Southern Lightweight Aggregate Corp. v. United States,* 1 A.F.T.R. 2d 392 (E.D. Va., 1957);

18. *Northwest Magnesite Co. v. United States,* 1 A.F.T.R. 2d 1405 (E.D. Wash., 1958);

19. *Arvonia-Buckingham Slate Co. v. United States,* 167 F.Supp. 903 (E.D. Va., 1958).

D. Treasury Letter of Jan. 26, 1959.

"THE SECRETARY OF THE TREASURY
Washington

Jan 26, 1959.

My dear Mr. Speaker:

In the Budget Message of the President, submitted to Congress on January 19, 1959, the President stated that the Treasury Department would recommend an amendment to the Internal Revenue Code specifying the treatment processes which shall be considered mining for the purpose of computing percentage depletion in the case of mineral products.

Early last year I testified before the Ways and Means Committee on the need to revise the law in order to preclude excessive depletion deductions for the brick and cement industries. My recommendation was made as a result of a series of court cases which permitted manufacturers of brick and cement to compute percentage depletion on the basis of the selling price of the finished manufactured product rather than on the value of the clay or cement rock before it is manufactured.

It is now apparent under the court decisions that manufacturers of many other products may obtain depletion allowances based on gross income derived from the sale of finished products. This can only result in increasing the depletion deduction for all minerals severalfold—in extreme cases as much as one hundred times. I do not believe that depletion on such an inflated scale is either reasonable or was intended. If permitted, the revenue losses will indeed be serious.

The problem arises because the term 'mining' is defined in the statute to include the ordinary treatment processes normally applied to obtain the 'commercially marketable mineral product or products' which, in many instances, may be an expensive finished product. Accordingly, in order to prevent excessive depletion allowances, I recommend the immediate elimination of the phrase 'commercially marketable mineral product or products' from the statute and the substitution of a new definition of 'mining' which will specify the allowable treatment processes for the various minerals.

The proposed legislation would not only prevent a substantial loss in revenue but would also help resolve difficult and complex problems in determining for many mineral industries the stage at which taxpayers first obtain a commercially marketable mineral product.

The Staff of the Treasury is now preparing a draft of the proposed legislation, and in this connection would be pleased to work in cooperation with the Ways and Means Committee staff and the Joint Committee staff in its development.

Sincerely yours,

/s/ Robert B. Anderson,
Secretary of the Treasury

Honorable Sam Rayburn
Speaker of the House of Representatives
Washington 25, D.C."

E. Treasury Letter of April 24, 1958.

"TREASURY DEPARTMENT
Washington
Apr 24, 1958

"My dear Mr. Chairman:

"Secretary Anderson, in testimony before your Committee on January 16, 1958, recommended that the law be revised to preclude the allowance of excessive depletion deductions for the brick and cement industries. His recommendation resulted from the Supreme Court's denial of a petition for certiorari in a series of cases involving manufacturers of bricks and cement which held that a taxpayer may compute percentage depletion on the basis of the selling price of the finished manufactured product rather than on the value of the clay or the cement rock before it is manufactured. It is estimated with respect to the two industries directly covered by the cases that excessive depletion allowances will result in a revenue loss of approximately $50 million a year.

"Courts have consistently found that the statute entitles taxpayers who are extracting minerals to compute their gross income from the property by including the treatment processes which mine operators would normally apply to obtain the first marketable product. The Government has contended that only concentration processes equivalent to those specifically named in the statute for certain minerals are mining processes and hence allowable, whereas manufacturing processes are not allowable. The result of the court decisions is that a taxpayer who extracts the mineral from the ground and applies processes thereto may base his depletion allowance on income from the commercially marketable product, regardless of whether or not his processes

are manufacturing processes. It is believed that depletion on this scale is excessive and was not intended.

"The enclosed proposed legislation would carry out the Secretary's recommendation, with respect to the clay and cement industries, and adopt the prior practice of the Department by delineating between mining and manufacturing processes. The bill specifies the processes allowable in determining a taxpayer's gross income from mining at a cut-off point which with respect to clay products would end with crushing and grinding, and, if the clay were sold in the form of the crude mineral, loading for shipment. The proposed legislation in addition would provide that clay, when used to manufacture building brick and tile products, shall be limited to the depletion rate of 5 percent. Otherwise, clays other than ordinary clay would obtain a distinct competitive advantage when used to manufacture common building products.

"The bill also provides a definition of ordinary treatment processes in the case of calcium carbonates, shale, and other minerals used in integrated operations to manufacture cement. The cut-off point with respect to these minerals is again consistent with prior practice.

"The bill does not affect limestone, calcium carbonates, or shale used for purposes other than making cement.

"The enclosed bill would restore a reasonable allowance of depletion for the cement and clay products industries, and at the same time, provide a statutory solution for administrative difficulties faced in determining for different taxpayers the stage at which taxpayers first obtain a commercially marketable mineral product.

"In the absence of further legislation providing a specific cut-off point for other minerals and ores, this Department will continue to face substantial problems in determining for many mineral industries the stage at which taxpayers first obtain a commercially marketable mineral product. There is, for example, a question as to whether the stage should be determined by reference to the taxpayer's own local market or the national market. In some cases the local market approach would have the effect of obtaining a different cut-off for the same mineral in different areas of the United States. On the other hand, the national market approach, while establishing a uniform first commercially marketable product for an entire industry, would be difficult to apply in instances where there is no readily available data with respect to the minerals concerned. Moreover, there is a question as to whether the courts would accept the national market approach as the correct construction of the statute.

"As noted, the enclosed bill provides a statutory solution only for the cement and clay products industries. This is the immediate need in view of the recent series of cases dealing with the cut-off point for percentage depletion in the manufacture of bricks and cement.

"The Treasury is prepared to furnish you and the Committee such assistance as you may suggest in resolving further difficulties in this area.

"The Director, Bureau of the Budget, has advised the Treasury Department that there is no objection to the submission of this proposed legislation.

"Sincerely yours,
(signed) Dan Throop Smith,
Deputy to the Secretary."

F. Petition for Certiorari.

In the Supreme Court of the United States. October Term, 1962. No .....

R. A. Riddell, District Director of Internal Revenue, Los Angeles District, Petitioner v. Monolith Portland Cement Co.

Petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

The Solicitor General, on behalf of R. A. Riddell, District Director of Internal Revenue, Los Angeles District, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case.

OPINIONS BELOW

The district court's findings of fact and conclusions of law (R. 168-185) are not officially reported. The opinion of the court of appeals (App. A, *infra,* pp. 19-39) is reported at 301 F. 2d 488.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1962. (App. A, *infra,* p. 40.) A petition for rehearing *en banc* was denied on May 22, 1962. By orders of Mr. Justice Douglas, entered on August 13 and September 20, 1962, the time for filing a petition for a writ of certiorari was extended to October 16, 1962. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether, for the purpose of computing the percentage depletion allowance on limestone, "mining," as defined in Section 114(b)(4)(B) of the Internal Revenue Code of 1939, includes the processes employed by an integrated miner-manufacturer to manufacture cement.

STATUTE AND REGULATIONS INVOLVED

The pertinent statutory provisions and Treasury Regulations are Sections 23 (m) and (n) and 114 (b)(4) of the Internal Revenue Code of 1939 and Section 39.23(m)-1 (e), (f), and (h) of Treasury Regulations 118. They are printed in Appendix B, *infra,* pp. 41-46.

STATEMENT

The respondent (hereinafter called the taxpayer) is an integrated miner-manufacturer engaged in mining limestone from its own quarry and manufacturing it into finished cement at its nearby plant in Monolith, California. (R. 171.) In its 1952 income tax return, it computed its percentage depletion allowance in accordance with the pertinent Treasury Regulations. (R. 175). After paying its taxes for that year, it filed claims for refund (R. 39-43, 176-177) and later instituted this suit for refund (R. 3-22)[1] on the ground that its "gross income from mining" (its depletion base) was its gross receipts from sales of finished cement. (R. 6, 12). The government defended the suit on the ground that "mining" termi-

[1]That portion of the taxpayer's complaint covering the years 1953 and 1954 (R. 22-38) was dismissed on stipulation of the parties (see R. 163-164).

nated with the primary crushing process. (R. 86, 90, 91, 137.) The district court granted (R. 162) a motion for summary judgment filed by the taxpayer (R. 104-105), viewing the issue as one of law (R. 170), but deciding the case without the benefit of this Court's subsequent decision in *United States v. Cannelton Sewer Pipe Co.,* 364 U.S. 76. The result of the increase in the taxpayer's depletion allowance was a holding that the taxpayer should not have paid any income tax at all for 1952 and was entitled to a refund of taxes in the amount of $186,753.40 plus interest. (R. 178-179.) The court of appeals, notwithstanding this Court's intervening decision in *Cannelton,* affirmed the judgment of the district court.[2] (App. A, *infra,* pp. 19-40.)

The significant facts are undisputed. Limestone is widely distributed in the United States, has the greatest variety of uses of any rock quarried, and is used more extensively than any other type of stone. (Ex. A, R. 353, p. 25; see also R. 74.) Among other things, limestone is used as the basic, necessary raw material in the manufacture of cement. (R. 62, 113, 114.) The limestone industry is divided into two distinct branches according to usage—(1) dimension stone and (2) crushed and broken stone. (Ex. F, R. 525, p. 1; Pl. Ex. 14, R. 693, p. 2; see also Ex. A, R. 353.) The taxpayer does not mine dimension stone; it blasts the

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[2]There have been two other issues in the case. The "marble" issue raised by the Government in the trial court as an additional defense, is not raised in this petition. A collateral estoppel issue was raised by the taxpayer in relation to both of the other issues, but both courts below preferred to rest their decisions on the merits. (R. 169-170; App. A, *infra,* p. 39.) In view of this Court's subsequent decision in *Cannelton,* collateral estoppel clearly does not apply to the issue presented on this petition. See *Commissioner v. Sunnen,* 333 U.S. 591.

limestone from the face of the quarry and crushes it for use in manufacturing cement. (R. 6-7, 173.)

In 1952 (the taxable year), there were approximately 297,000,000 tons of crushed and broken limestone sold or used by producers in the United States (Ex. A, R. 353, p. 29; Pl. Ex. 14, R. 693, p. 12.) Excluding the substantial tonnage used in manufacturing cement (see Ex. C, R. 463, p. 13) and that used to make lime, which are reported "in terms of finished products" in the Cement and Lime chapters of the Minerals Yearbooks annually issued by the United States Bureau of Mines (Ex. A, R. 353, pp. 1, 29), over 216,000,000 tons of limestone (including chemical and metallurgical grade), with an average value of $1.36 a ton, were sold or used by producers in crushed or broken form in the United States in 1952. (*Id.,* pp. 26-27.) Of that total, over 1,500,000 tons were sold or used by producers in California (in addition to that used to manufacture cement). (*Id.,* p. 26.) There are eight grinding plants in California alone which purchase and process limestone. (Ex. 1, R. 599, p. 15.)

In 1952, the taxpayer sold no limestone in crushed or broken form or in any other form; it used all of its limestone to make finished cement (R. 171), which, as both courts below assumed (R. 171; App. A, *infra,* pp. 21, 22, 26-27), is a "manufactured" product (Ex. C, R. 463, pp. 3, 13; Ex. D, R. 499, p. 1; Pl. Ex. 14, R. 693, p. 14).[3] The district court found that in 1952 "it was not economically or commercially feasible for [the

[3]The production of cement includes the heating of blended materials in a rotary kiln which causes a chemical change to occur in the materials. (R. 9, 106).

taxpayer] to use any of such limestone in the production of dimension stone, or crushed limestone" and that "[t]here was not at any time during the taxable calendar year 1952, any commercial market, within the market area available to [the taxpayer], for the limestone extracted and used by [the taxpayer]". (R. 171-173.)

The processes which the taxpayer used in mining its limestone and manufacturing it into cement are correctly set forth in paragraph 12 of the taxpayer's complaint (R. 173), which appears at R. 6-7. Those processes, which the trial court found are normally used in the cement industry (R. 174), may be summarized as follows: blasting the face of the quarry; several crushing processes; transportation to its plant two miles away; blending the limestone with small amounts of clay, silica, iron cinders, and fluorspar; adding water and making a "slurry" of the blended material; grinding the slurry; heating the slurry in a rotary kiln, where the water is evaporated and the remaining material is chemically combined into a dense "clinker"; adding a small amount of gypsum to the clinker and grinding it to a very great fineness. At this point, cement has been produced.

The raw materials used by the taxpayer in manufacturing cement included not only limestone but six other materials, *i.e.*, clay, silica, tufa, gypsum, iron cinders and fluorspar. Two of those—iron cinders and fluorspar—were purchased, rather than mined, by the taxpayer.[4] (R. 146.)

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[4]The amount of each raw material used by the taxpayer in 1952 is stipulated and set forth at R. 146.

REASONS FOR GRANTING THE WRIT

The decision of the court below is in conflict with the decisions of other courts of appeals on an issue which involves substantial amounts of revenue for the years prior to 1961 and which, despite a statutory amendment, remains of importance to the determination of depletion cases for future years. These reasons alone justify granting a writ of certiorari. There is, however, a more important reason for granting the writ. The Ninth Circuit has failed—perhaps even refused—to follow the plain teaching of this Court's decision in *United States v. Cannelton Sewer Pipe Co.*, 364 U.S. 76, in a context which is indistinguishable. Respect for the orderly processes of resolution of disputed questions of federal law requires the correction of any such marked disregard of this Court's decisions.

1. Section 23(m) of the Internal Revenue Code of 1939[5] states that in computing taxable net income a deduction from gross income shall be allowed for depletion of mines. The allowance for the mineral deposits here in issue is calculated by taking a specified percentage[6] of the gross income from the property. Section 114(b)(4)(A). "Gross income from the property" is defined by the Code as meaning "the gross income from mining." Section 114(b)(4)(B). "Mining", in turn, is declared "to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the com-

[5]All further statutory references, unless otherwise indicated, are to the Internal Revenue Code of 1939.

[6]There is no dispute in the present case as to the appropriate percentage.

mercially marketable mineral product or products * * *" (*ibid.*). The same section lists the limited types of treatment processes which can be considered part of "mining".

There has been a wealth of litigation as to what treatment processes are ordinarily applied to obtain the commercially marketable mineral product in each of a number of areas of mining. This is not surprising; the more income-producing processes that are included in "mining", the greater the income from "mining", and therefore the greater the deduction allowed by the Internal Revenue Code for the depletion of mineral assets.

In *United States v. Cannelton Sewer Pipe Co.*, 364 U.S. 76, this Court undertook to lay at rest the major and most pervasive question in dispute. The Court held that the statutory references to "ordinary treatment processes" and a "commercially marketable mineral product" prescribe an objective standard for determining the cut-off point of "mining" for any given branch of the mining industry. That cut-off is at the point where the mineral first becomes fit for commercial sale, shipment, or use. Thus, the Court attempted to put an end to discrimination among mineral producers in different localities and between integrated and non-integrated miners.

The relevant facts of *Cannelton* were these. The Cannelton company mined fire clay and manufactured sewer pipe from it.[7] The record showed that, although there was a market in which substantial amounts of fire clay was sold (in Brazil, Indiana), Cannelton's costs of mining alone exceeded the market value of the clay at that market and that the cost of

[7]Shale in lesser quantities was also involved.

transportation to market would have been several times the market value of the clay. In short, there was no market in which Cannelton could, as a matter of commercial realities, sell its clay, for any clay it could sell in the nearest market would be sold at a loss.

Recognizing these facts was, of course, not to say that a sewer pipe manufacturer such as Cannelton was foolish to continue to mine clay when it could be purchased elsewhere at a lower price. The cost of transporting clay from Brazil to its factory would have far exceeded the savings from purchasing the clay. In short, it was economical for Cannelton to supply its own needs as a manufacturer. In this Court's words, Cannelton, as a manufacturer, provided its own market for the product of its activities as a miner.

Cannelton contended, and the Seventh Circuit held, that the statutory provisions which base the depletion deduction upon income not only from extraction of a mineral but also from those processes normally applied to the mineral to obtain the commercially marketable mineral product meant that it could base its depletion on income from all those processes which it had to undertake in its particular circumstances to obtain a product which it could sell to others at a profit. Since it could not sell clay to others at a profit, it claimed, and was allowed by the lower courts, a deduction based upon its income from its manufactured product.

This Court reversed unanimously. It held that the statute, which spoke of "the *ordinary* treatment processes *normally* applied by mine owners or operators in order to obtain the commercially marketable mineral product" (emphasis added) and which listed the narrow range of processes it contemplated, was never

intended to make the depletable product in any given industry depend upon the peculiar methods of operation of each mine owner. Congress, the Court held, intended to provide a simple workable measure for computing depletion of the mineral asset. It did so by defining the depletion base in terms of the gross income from only those mining and treatment processes which are customarily applied in the industry as a whole prior to sale or shipment of the mineral product. This purpose of estimating the depletion of the mineral asset by reference to its value or proceeds at the first point at which a market for it ordinarily exists would be distorted by including in the depletion base the value added by processes applied after the mineral has already reached the stage at which it is ready for commercial use.[8] Moreover, the Court pointed out, harmful discriminations would result if the depletion allowance were permitted to vary with the number of processing steps each miner found it desirable or necessary to undertake prior to a profitable sale of its ultimate product.

Finally, the Court held, the fact that there was no market in which Cannelton could realistically be expected to sell its clay (for any such sale would be at a loss) was irrelevant to a determination of the commercially marketable product on which Cannelton could claim depletion. Cannelton's mineral clay, no less than the product of any other operator of a clay mine, had value as a mineral. "As we see it, the miner-manufacturer is but selling to himself the crude min-

[8]In the language of the opinion (364 U.S. at 86), minerals "have passed the 'mining' state on which the depletion principle operates" when they "are in such a state that they are ready for industrial use or consumption * * *."

eral that he mines, insofar as the depletion allowance is concerned." 364 U.S. at 87. Cannelton's depletion allowance should be the same as that which would be allowed to a separate taxpayer that owned Cannelton's mine and sold its product to Cannelton for further processing and fabricating. "We believe that the Congress intended integrated mining-manufacturing operations to be treated as if the operator were selling the mineral mined to himself for fabrication." 364 U.S. at 89.

In sum, this Court's *Cannelton* decision plainly construed the statutory definition of "mining" as prescribing an objective standard, to be uniformly applied throughout each branch of the mining industry, under which the cut-off point to "mining" is at the stage where, with the application of the *normal* processing techniques appropriate to the particular branch, the mineral *first* becomes suitable for industrial use or consumption (a point which, unless the particular branch of mining industry is completely integrated, will be reflected in sales of the mineral by ordinary, run-of-the-mill miners).

The present case is identical in all material respects. The Monolith Company mines limestone, crushes it, and then transports the crushed product two miles to its plant where additional processing is undertaken and additional materials are added to manufacture cement (R. 173-174). Notwithstanding the district court's finding (R. 171-172) that "[t]here was not * * * any commercial market, *within the market area available to plaintiff*, for the limestone extracted and used by [the taxpayer] * * *" [emphasis added], if the limestone industry as a whole is considered there is incontestably a most substantial commercial market for

the sale of crushed limestone. Crushed limestone is therefore, under the holding of *Cannelton,* the "commercially marketable mineral product" with reference to which depletion is computed. To determine Monolith's depletion deduction in terms of its income from the sale of cement accomplishes the very results which this Court held unauthorized in *Cannelton.* It allows the taxpayer to "enjoy, in addition to a depletion allowance on his minerals, a similar allowance on his manufacturing costs, including depreciation on his manufacturing plant, machinery and facilities." 364 U.S. at 88. It "would not only give [the taxpayer] a preference over the ordinary nonintegrated miner, but also would grant it a decided competitive advantage over its nonintegrated manufacturer competitor." 364 U.S. at 87. Finally, this Court was speaking of a company such as Monolith when it said, "We believe that the Congress intended integrated mining-manufacturing operations to be treated as if the operator were selling the mineral mined to himself for fabrication." 364 U.S. at 89.

The Ninth Circuit was not unaware of its departure from *Cannelton* when it allowed Monolith to calculate its depletion on the basis of income from the sale of cement. It acknowledged a "reluctance" to come to its conclusion "because of some doubt if it can be reconciled with the reasoning of the Supreme Court in *Cannelton.*" App. A, *infra,* p. 36. Moreover, it openly expressed its disagreement with much of this Court's reasoning in *Cannelton.* See App. A, *infra,* pp. 31-33.

Still, the court of appeals allowed depletion based on manufactured cement. Its only attempt to distinguish *Cannelton* was plainly unsound. Relying upon

the district court's finding that there was no "commercial market, within the market area available to [the taxpayer] for the limestone extracted," the court of appeals held that, while there was a local market (albeit an unprofitable one) for Cannelton's clay, there was *no* local market for Monolith's crushed limestone. The distinction fails, if for no other reason because this Court made clear in *Cannelton* that an integrated miner-manufacturer is to be viewed as its own market for the product it mines. But the distinction fails for a more fundamental reason as well. *Cannelton* established that the existence of a commercial market for the sale of a mineral product was only relevant in determining an industry-wide line as the cutoff point for mining.[9] That the statute looks to the general practices of each industry as a whole and not to the existence or absence of a market commercially available to every individual mine operator was the precise holding of *Cannelton,* where the Cannelton Company was the only user of raw fire clay in the limited market area available to the taxpayer in the light of its mining and transportation costs and where, as in the present case, there was no "commercial market, *within the market area available to [the taxpayer]*" (emphasis added).

2. As we have shown, the decision below is directly opposed to this Court's decision in *United States v. Cannelton Sewer Pipe Co., supra.* It is also in conflict with the decision of the Seventh Circuit in *Commissioner of Internal Revenue v. Halquist,* 291 F. 2d 49,

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[9]In fact, the existence of a substantial market furnishes "conclusive proof" (364 U.S. at 86) that the mineral has "passed the 'mining' state on which the depletion principle operates" (*ibid.*).

which has recently been followed by the Fourth Circuit in *Virginia Greenstone Co. v. United States,* No. 8577, decided September 24, 1962 (reprinted in App. C, *infra,* pp. 47-56).

In *Halquist,* the taxpayer removed blocks of stone from quarries and transported them 50 to 250 feet away where they were cut into regular shapes for later sale and use as veneer stone. Because 40 to 50% of the weight of the blocks was lost in the processes of cutting, the blocks could not be sold in substantial quantities prior to cutting, for sales at this stage would entail costly transportation of material which would later prove to be largely waste. The taxpayer contended that *Cannelton* did not apply in a situation where there is no commercial market available to the taxpayer for the sale of his mineral product (there, uncut stone blocks). The Seventh Circuit rejected this argument, the same as that made by Monolith below, and held that rough uncut blocks were the "commercially marketable" product, stating (*id.* at 52):

> * * * Lacking local or area sales of the precise stone in Halquist's quarries to establish the cutoff point when the mineral first becomes suitable for industrial use or consumption, we must have recourse to the recognized branch of the mining industry to which Halquist may be assigned. * * * The evidence * * * shows that in typical dimension stone mining, rough blocks are removed and sold for process in substantial quantities. Cannelton prescribes an objective, standard cutoff point to be uniformly applied throughout each particular branch of the mining industry.

It added that, as in *Cannelton,* the taxpayer should be regarded as selling its mineral product to itself for later processing.

In *Virginia Greenstone Company v. United States, supra,* the Fourth Circuit reached the same result relying upon the *Cannelton* and *Halquist* cases. It held that the sole miner and consumer of a stone product called "greenstone", which is used for ornamental and dimension-stone purposes, must calculate its income from mining on the basis of the uncut, unfinished quarry blocks of greenstone it removed, although there was neither a local nor a national market for the sale of these blocks. Quarry blocks of other mineral materials are sold for the same purposes as greenstone and these sales, the court held, establish the commercially marketable mineral product for the dimension stone industry. "The result is", it concluded, "that the taxpayer must be regarded as having sold the quarry blocks to itself and is required to compute allowable percentage depletion on the gross income constructively received upon such sales."

3. Although the depletion provisions of the statute were amended in 1960 and the amendments have expressly limited the treatment processes includible within the definition of mining for taxable years after 1960, this Court's decision in *United States v. Cannelton Sewer Pipe Co., supra,* and the erroneous interpretation of that decision by the court below remain applicable to a substantial volume of litigation for the years

prior to 1961. Presently pending are suits involving almost $14,000,000 in tax revenue.[10] This figure does not, of course, take into account those taxpayers who are in a position to file new refund claims for years prior to 1961 which are still open under the applicable limitations provisions.[11] This volume of litigation and the large amounts of revenue which are involved fully justify review of a decision flagrantly disregarding the mandate of *United States v. Cannelton Sewer Pipe Co., supra.*

4. The issue involved in the present case will remain of importance for years after 1960 under the amended depletion provisions of the Internal Revenue Code. The Gore Amendment, 74 Stat. 290, 291-293, eliminated the Code's general definition of mining as including those "ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product." "Mining" is now defined simply in terms of the specific

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[10]The following is a brief summary of pending litigation, showing the number of suits and approximate amounts involved:

Limestone, including that mined by four cement companies—14 suits	$4,000,000
Salt—three suits	5,700,000
Gypsum—two suits	1,800,000
Phosphate rock—two suits	500,000
Silica—three suits	1,600,000
	$13,600,000

[11]While, in general, any taxpayer who is not barred by a limitation provision may file new claims for refund for years prior to 1961, relying upon the decision below, the threat is more limited in the cement industry. The statutory amendments in 1960 included an elective provision under which cement manufacturers could choose to use a pre-kiln cut-off point for *all* open tax years prior to 1961. 74 Stat. 1018. Since all but about six cement manufacturers made this election, only these six (of which Monolith is one) can file additional refund claims for years prior to 1961 on the srrength of the decision below.

treatment processes which had previously been listed in the 1939 and 1954 Codes, plus certain additional processes for cement manufacturers and some consumers of clay.

The amendment does not, however, eliminate the necessity of determining the "cut-off" point for mining in terms of the legislative history reviewed in *Cannelton* and in terms of the *Cannelton* decision itself. For example, in the case of minerals which are customarily sold in the form of a crude mineral product, "mining" is defined as including extraction plus "sorting, concentrating, sintering, and substantially equivalent processes to bring to shipping grade and form." Since this language is substantially the same as that previously contained in the 1939 and 1954 Codes, the *Cannelton* decision will continue to provide the most important guide to those processes which are permissible "to bring [the mineral] to shipping grade and form." To cite but one specific example, the *Cannelton* decision will determine the "cut-off" point for the "mining" income of a mine operator who sells and ships a crushed stone (such as limestone) in any of a number of progressively smaller sizes which are obtained by the application of machinery and labor in successive crushing processes. Cf. *Riddell v. California Portland Cement Co.*, 297 F. 2d 345 (C.A. 9) and *Fannin Investment Co. v. United States*, 197 F. Supp. 693 (N.D. Ga.); but cf. *Bookwalter v. Centropolis Crusher Co.*, 305 F. 2d 27.[12]

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[12]In *Bookwalter v. Centropolis Crusher Co., supra*, the Eighth Circuit held that the "mining" of limestone of chemical and metallurgical grade includes all of the processes which the particular taxpayer employed to process its limestone into eight different graded sizes, including finely ground, although the tax-

CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted, the judgment below reversed and the case remanded for disposition in accordance with *United States v. Cannelton Sewer Pipe Co.*, 364 U.S. 76.

Respectfully submitted.

Archibald Cox,
Solicitor General.

John B. Jones, Jr.,
Acting Assistant Attorney General.

Ralph S. Spritzer,
Assistant to the Solicitor General,

Melva M. Graney,
Attorney.

October 1962.

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payer itself sold 80 percent of its limestone in crushed form without fine grinding. While we regard this decision as incorrect, we have not petitioned for certiorari because the record does not present the relevant issues with sufficient clarity.

G. List of Pending Tax Matters and Dollars Involved.

MONOLITH PORTLAND CEMENT COMPANY

Taxable Year	Status	Amount of Assessment, Formal Deficiency or Proposed Deficiency	6% Interest to 4-15-64	Total
1953	Formal deficiency (Tax Court Dkt. 82183)	$ 259,523.33	$ 155,714.00	$ 415,237.33
1954	Formal deficiency (Tax Court Dkt. 82183)	292,856.85	158,142.70	450,999.55
1955	Proposed deficiency (Appellate Division)	421,997.62	202,558.86	624,556.48
1956	Proposed deficiency (Appellate Division)	179,472.67	75,378.52	254,851.19
1957	Proposed deficiency (Appellate Division)	97,003.54	34,921.27	131,924.81
1958	Proposed deficiency (Appellate Division)	96,983.70	29,095.11	126,078.81
1959	Proposed deficiency (Appellate Division)	54,234.35	13,016.24	67,250.59
	TOTALS	$1,402,072.06	$ 668,826.70	$2,070,898.76

MONOLITH PORTLAND MIDWEST COMPANY

1951	Assessment (Case No. 18505 herein)	26,582.86	19,139.66	45,722.52
1952	Assessment (Case No. 18505 herein)	19,624.03	12,951.86	32,575.89
1953	Proposed deficiency (Appellate Division)	35,691.27	21,414.76	57,106.03
1954	Formal deficiency (Tax Court Dkt. 82184)	111,208.02	60,052.33	171,260.35
1955	Proposed deficiency (Appellate Division)	214,087.41	102,761.96	316,849.37
1956	Proposed deficiency (Appellate Division)	193,926.51	81,449.13	275,375.64
1957	Proposed deficiency (Appellate Division)	215,606.63	77,618.39	293,225.02
1958	Proposed deficiency (Appellate Division)	188,263.14	56,478.94	244,742.08
1959	Proposed deficiency (Appellate Division)	246,571.65	59,177.20	305,748.85
	TOTALS	$1,251,561.52	$ 491,044.23	$1,742,605.75
	COMBINED TOTALS	$2,653,633.58	$1,159,870.93	$3,813,504.51

H. Table of Exhibits.

Monolith Portland Cement Company v. R. A. Riddell
(On motion for summary judgment)

Exhibits	Identified	Printed Record
To complaint:		
A	R. 20	R. 39
B	R. 20-21	R. 44
C	R. 21	R. 45
D	R. 21	R. 46
To supplement to complaint:		
A	R. 143	
B	R. 143	
C	R. 143	
To Elliott affidavit and supplement:		
A	R. 115	R. 353
B	R. 115	R. 393
C	R. 150	R. 463
D	R. 150	R. 499
E	R. 150-151	R. 509
F	R. 150-151	R. 525
G	R. 150-151	R. 553
H	R. 150-151	R. 571
I	R. 150-151	R. 599
To Neuhauser affidavit:		
A	R. 121	R. 127
C	R. 122	
D	R. 123	R. 129
E	R. 126	R. 130
To Gillette affidavit:		
A	R. 132	R. 617
B	R. 133	R. 621
C	R. 134	
To agreed memorandum re interest:		
A	R. 165	R. 166
B	R. 165	R. 167
From Case 202-56WM (C.A. No. 16063):		
2	R. 188	R. 337
10	R. 188	R. 625
11	R. 188	R. 667
13	R. 188	R. 669
14	R. 188	R. 693
23	R. 188	R. 339
From Victorville Lime Rock Co. case (C.A., No. 16714):		
S	R. 145, 188, 195	R. 731
W	R. 145, 188, 195	R. 739

I. Table of Exhibits.

U. S. A. v. Monolith Portland Midwest Company

Case No. 18505

Exhibits	Identified (Reporter's Tr. page)	Received as Evidence (Reporter's Tr. page)	Rejected as Evidence (Reporter's Tr. page)
1	457	457	
2	458	458	
3	458	458	
4	459	459	
5	459	459	
6	462	462	
7	463	463	
8	469	469	
9	470	470	
10	471	471	
11	472	472	
12	474		474
13	474	474	
14	475	475	
15	244	244	
16	248	248	
17	248	248	
18	251	251	
19	256	256	
20	262	262	
21	370		
22	410	411	
23	414	416	
24	414	416	
25	414	416	
26	420	425	
27	420	425	
28	420	425	

Exhibits	Identified (Reporter's Tr. page)	Received as Evidence (Reporter's Tr. page)	Rejected as Evidence (Reporter's Tr. page)
29	425	428	
30	433	532	
30-A	529	532	
31	433	532	
31-A	529	532	
32	433	532	
32-A	529	532	
33	484	484	
34	486	486	
35	486	486	
36	487	487	
37	488	488	
38	489	489	
39	490	490	
40	637	637	
41	655	655	
42	704	705	
43	705	706	
44	727		729 Excluded under Rule 43(c)
45	839	839	
46	839	839	
A	482	482	
B	482	482	
C	732	732	
D	733	733	
E	733	733	
F	735	735	
G	735	735	
H	737	737	
I	737	737	
J	737	737	

Exhibits	Identified (Reporter's Tr. page)	Received as Evidence (Reporter's Tr. page)	Rejected as Evidence (Reporter's Tr. page)
K	738	738	
M	739	739	
N	250	250	
O	252	252	
P	255	255	
Q	255	255	
R	255	255	
S	256	256	
T	256	256	
U	257	257	
V	257	257	
W	258	258	
X	605	605	
Y	615	740	
Z	679	680	
AA	742	743	
BB	781	783	
CC	783	784	
DD	843	843	